

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

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| THE CITY OF HUNTINGTON, | : | Civil Action |
| | : | |
| Plaintiff, | : | No. 3:17-cv-01362 |
| | : | |
| v. | : | |
| | : | |
| AMERISOURCEBERGEN DRUG | : | |
| CORPORATION, et al., | : | |
| | : | |
| Defendants. | : | |

| | | |
|---------------------------|---|-------------------|
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| | : | |
| CABELL COUNTY COMMISSION, | : | Civil Action |
| | : | |
| Plaintiff, | : | No. 3:17-cv-01665 |
| | : | |
| v. | : | |
| | : | |
| AMERISOURCEBERGEN DRUG | : | |
| CORPORATION, et al., | : | |
| | : | |
| Defendants. | : | |

BENCH TRIAL - VOLUME 33
BEFORE THE HONORABLE DAVID A. FABER, SENIOR STATUS JUDGE
UNITED STATES DISTRICT COURT
IN CHARLESTON, WEST VIRGINIA

JULY 1, 2021

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1 PROCEEDINGS had before The Honorable David A.
2 Faber, Senior Status Judge, United States District
3 Court, Southern District of West Virginia, in
4 Charleston, West Virginia, on July 1, 2021, at 9:00
5 a.m., as follows:

6 THE COURT: Happy birthday, Mr. Farrell. I
7 can't even remember when I was 49.

8 (Laughter)

9 MR. FARRELL: Thank you, Judge.

10 I have the honor of cleaning up a couple of things
11 before the plaintiff rests.

12 I have a cheat sheet for the court reporter that I'm
13 going to read into the record.

14 COURT REPORTER: Thank you.

15 MR. FARRELL: During plaintiffs' questioning of
16 AmerisourceBergen witness Steven Mays, AmerisourceBergen
17 objected to the use of certain spreadsheets that showed
18 threshold amounts, overrides, orders, released or held, and
19 orders reported to the DEA.

20 That's at trial transcript May 18th -- May 18th, 2021,
21 transcript Page 110.

22 Plaintiffs and AmerisourceBergen have since conferred
23 and agreed to the resubmission and admission of three
24 spreadsheets that are as follows:

25 P-44765 was originally produced by AmerisourceBergen

1 bearing Bates stamp ABDCMDL01911481. This document is a
2 spreadsheet that's been adjusted at AmerisourceBergen's
3 request to include only AmerisourceBergen Cabell County
4 customers. The content of the spreadsheet shows the order
5 monitoring history of all prescriptions and control items
6 for 2008 through 2012.

7 Next, P-44766 was originally produced by
8 AmerisourceBergen bearing Bates ABDCMDL01911482. This
9 document is a spreadsheet that has been adjusted at
10 AmerisourceBergen's request to include only
11 AmerisourceBergen's Cabell County customers. The content of
12 the spreadsheet shows orders reported to the DEA for all
13 prescriptions and control items from 2007 through 2012.

14 Third, P-44767 was originally produced by
15 AmerisourceBergen bearing Bates ABDCMDL01911479. This
16 document is a spreadsheet that's been adjusted at
17 AmerisourceBergen's request to include only
18 AmerisourceBergen's Cabell County customers. The content of
19 this spreadsheet shows orders reported to the DEA for all
20 prescription and control items from 2012 to 2018.

21 Finally, to make the record clear, these documents are
22 provided to correct the record and identification of
23 documents during the direct examination of Steven Mays. The
24 documents are intended to replace previously identified
25 Exhibits P-2819A, as in alpha, and P-16639A, as in alpha.

1 So P-44765 replaces P-2819A referenced at the May 18th,
2 2021, transcript, Page 110. And P-44766 and P-44767 replace
3 P-16639A referenced at the May 18th, 2021, transcript at
4 Page 109.

5 THE COURT: I understand there's no objection to
6 this by any of the other parties.

7 MS. MCCLURE: No objection from ABDC.

8 MS. MAINIGI: None from us, Your Honor.

9 MR. FARRELL: Then we have one or two other
10 cleanup items.

11 THE COURT: Okay.

12 MS. CHRISTENSON: Your Honor, we previously
13 submitted, offered Kim Howenstein's deposition designation.
14 We are submitting it finally.

15 MR. FARRELL: Judge Faber, on behalf of the
16 plaintiffs, the City of Huntington and the Cabell County
17 Commission, we rest.

18 THE COURT: Thank you, Mr. Farrell.

19 Who's going first?

20 MR. HESTER: Your Honor, I have the honors.

21 THE COURT: All right. I understand the
22 defendants are all going to orally make a Rule 52(c) motion.

23 MR. HESTER: Yes, Your Honor. And I thought it
24 might be helpful to the Court to just lay out a short
25 roadmap of what our plan is for these motions.

1 I'm going to begin with an overarching motion addressed
2 to the issue of proximate causation. My colleagues are then
3 going to argue separate Rule 52 motions that are related to
4 the separate conduct of each of the three defendants. So
5 there will be three separate arguments on those three
6 separate motions. I'll then return to argue an overarching
7 motion related to abatement relief.

8 So those will be the five motions that we're planning
9 to argue to the Court. And our aim is to hold at least 20
10 minutes of our allocated time for rebuttal. We're going to
11 try to stick to the clock, Your Honor, and that's what we're
12 hoping to achieve is about 20 minutes for rebuttal.

13 At the conclusion of these arguments today and the
14 plaintiffs' responses, we are planning to file briefs in
15 support of these five motions. And we'll provide copies,
16 courtesy copies to the parties and the Court to that as
17 well.

18 So with that, Your Honor, let me begin.

19 The plaintiffs (verbatim) move under Rule 52 for
20 judgment on partial findings based on plaintiffs' failure to
21 prove proximate causation.

22 The core allegation that the plaintiffs have made in
23 this case is that there is an excessive volume of pills, a
24 flood of pills. That was the heart of their opening, as the
25 Court will recall, and it's been the heart of their case

1 ever since focusing on the volume.

2 And the evidence is overwhelming and uncontroverted, in
3 our view, that the flood of pills, if there was one, was
4 caused by increased prescribing. And we have a few slides
5 just to reflect this.

6 Dr. Gupta highlighted that there was a culture of
7 attempting to reduce pain from a scale of whatever to zero
8 for every West Virginian. He said that was the culture.
9 That was the education. That was the influence.

10 Dr. Keyes, one of plaintiffs' important
11 epidemiologists, agreed that the high volume of opioid
12 prescriptions became the foundation for the overall
13 expansion in the opioid supply.

14 Mr. Rannazzisi said that the crisis started with
15 prescriptions. He agreed that that was what started the
16 crisis.

17 And Mr. Rafalski said that there was no other way for
18 the volume to increase; there was no other way for the
19 charts that he was showing to go up unless there had been an
20 increase in prescriptions.

21 The evidence is also overwhelming and uncontroverted,
22 in our view, that this increased prescribing was undertaken
23 in good faith. And there's extensive testimony in this
24 record that the, that the prescribing by doctors was
25 undertaken in good faith in their best medical judgment as

1 to what was needed to treat pain based on prevailing
2 standards at the time.

3 The evidence is also overwhelming and uncontroverted,
4 in our view, that this increase was driven by a change in
5 the standard of care for the treatment of pain.

6 And we saw that early in the case, first week. We
7 presented to the Court various policy statements issued by
8 the West Virginia Board of Medicine in 1997, 2005, 2013, all
9 of which encouraged opioid prescribing and called on doctors
10 to be more attentive to treating pain.

11 There was also the Fishman book that the Court has
12 heard about on several occasions that was issued and sent to
13 every doctor and every prescriber in the State of West
14 Virginia in 2008 encouraging the prescribing of opioids and
15 again calling on doctors to be focused and attentive to the
16 treatment of pain.

17 The evidence is also overwhelming and uncontroverted,
18 in our view, that distributors cannot second-guess these
19 prescribing decisions by doctors. And there were two
20 powerful statements made on this point by the two DEA
21 related experts the plaintiffs offered; Mr. Rafalski who
22 agreed that the DEA does not expect distributors to
23 second-guess legitimate medical judgments of doctors, and
24 Mr. Rannazzisi who agreed that a distributor cannot make the
25 determination whether a controlled substance is medically

1 necessary for a particular patient.

2 So the plaintiffs stake their entire case on the volume
3 of pills. But the increased volume was caused by
4 doctor-prescribing. The flood of pills that lies at the
5 heart of the plaintiffs' case was caused by
6 doctor-prescribing.

7 And I think it's reflected very clearly in this
8 question and answer from, from Dr. Keyes. The question:

9 "The opioid crisis would not have occurred if
10 prescribing opioids had not become standard practice in
11 managing acute and chronic pain; correct?"

12 She said, "That's right."

13 We think that's dispositive, Your Honor. It's a very
14 clear, very clean statement and it reflects the entirety of
15 the evidence in this record.

16 Now, the plaintiffs claim harm from the increased
17 prescribing based on diversion after the pills have been
18 prescribed, have left the pharmacies, and are out in
19 medicine cabinets or otherwise in the community. That was
20 the clear focus of the harm theory that the plaintiffs
21 presented.

22 And, again, Dr. Keyes presented testimony on this point
23 if we go to the next slide. Okay.

24 "So when you talk about exposure and supply --" this
25 was the issue that she was identifying and the plaintiffs

1 have highlighted throughout the case. There was a huge
2 increase in volume caused by doctor-prescribing. That
3 increase in volume was out in the community. And the
4 evidence is clear and, again, uncontroverted that
5 distributors cannot and do not control this kind of what we
6 could call medicine cabinet diversion.

7 After the pills have been prescribed, they've left the
8 pharmacy, they're out in the community, the distributors no
9 longer have control over them. And that's very clearly
10 reflected in the next slide, statements again from Mr.
11 Rafalski and Mr. Rannazzisi who acknowledged that
12 distributors cannot control diversion after pills leave the
13 pharmacy, after they're out in the community.

14 And, it's -- of course, it stands to reason. It's
15 understandable. Once the pills are in the community because
16 doctors have prescribed them, distributors no longer have
17 control over what happens to them since. And the
18 plaintiffs' theory of harm is that the pills were out in the
19 community and that's when the harm occurred. And that is
20 outside the control of distributors.

21 So given this clear, essentially, undisputed and
22 uniform record, there are two cases issued from this
23 district that are dispositive on the issue of proximate
24 causation.

25 The first is the *Employer Teamsters* case and the second

1 is the *City of Charleston* case, the *Employer Teamsters* case
2 written by Judge Chambers who pointed to the vast array of
3 intervening events including the independent medical
4 judgment of doctors that defeated a showing of proximate
5 causation.

6 And I would emphasize, Your Honor, that both of these
7 cases are on pre-trial motions. Here we've gone through an
8 extensive development of evidence. We're in the midst of
9 trial. The record is clear. But we have these two very
10 clear, very well-reasoned decisions from this district that
11 set out the proper legal step, standard and tell us the
12 answer to the question on proximate causation.

13 *City of Charleston*, the case written -- decision
14 written by Judge Copenhaver again points to the fact -- and
15 it's the first quotation on the right side. "No injury
16 would occur unless the physician proceeded to unnecessarily
17 prescribe opioid treatments."

18 That's a very important point. That's essentially the
19 same point we're making here. No injury would occur under
20 the plaintiffs' own theory unless the doctors prescribe the
21 opioids.

22 And that's the statement that I highlighted a few
23 minutes ago from Dr. Keyes who said but for the prescribing,
24 this would not have happened.

25 That's exactly what Judge Copenhaver addressed in the

1 *City of Charleston* case, again on a pre-trial motion. And
2 here we are, we've gone through the evidence, we've built
3 the record to show that it was doctor prescribing that led
4 to the harm.

5 These cases establish that there must be a direct
6 relationship between the claimed harm and the alleged
7 wrongful conduct.

8 And, in particular, both of these cases establish that
9 doctors' intervening prescribing decisions defeat proximate
10 causation as a matter of law under West Virginia law.

11 THE COURT: Were either of those cases appealed,
12 Mr. Hester, to your knowledge?

13 MR. HESTER: Your Honor, I believe the *City of*
14 *Charleston* case there is a motion to amend the complaint.
15 I'm not aware of an appeal in *Employer Teamsters*.

16 THE COURT: Thank you.

17 MR. HESTER: But we submit, Your Honor, that these
18 two decisions issued by this district set out the legal test
19 and provide the legal answer to the question now that we've
20 built the record showing that it was prescribing decisions
21 that drove the volume that the plaintiffs are alleging
22 caused the injury. It was prescriber decisions, and these
23 two cases say that defeats proximate causation.

24 I would add, Your Honor, that these decisions from this
25 district, this Federal Court, squarely reflect the

1 remoteness requirement of West Virginia law.

2 And I've put up two cases on the slide here. The
3 *Aikens* case, remoteness is a component of proximate cause.
4 That's under West Virginia law. And the *Metro vs. Smith*
5 case saying that conduct must be a proximate, not a remote,
6 cause of injury.

7 So we have these two cases under West Virginia law,
8 West Virginia State law cases, and then *City of Charleston*
9 and *Employer Teamsters* out of this court apply that West
10 Virginia legal standard and conclude that the intervening
11 prescribing decisions of doctors defeat the showing of
12 proximate causation.

13 So that's my discussion on legal drugs, on prescription
14 opioids, the flood.

15 Let's also talk about illegal drugs. And, of course,
16 the Court has heard extensively about how illegal drugs have
17 really taken over as the key issue since at least 2013,
18 2014. Causation is clearly even more remote as to illegal
19 drugs.

20 First, on the plaintiffs' claim, their gateway theory,
21 that increased prescription opioids led to illegal drug use,
22 that's defeated under the same reasoning I've just laid out.

23 Doctors drove the increased prescribing. The record is
24 uncontroverted on that point. And if illegal drug use
25 followed from that increased prescribing, that necessarily

1 was caused by the doctor decision-making as well.

2 In other words, if the point of the plaintiffs' theory
3 is illegal drugs came after the prescribing of opioids, that
4 ties back to the doctor decision-making. *Employer Teamsters*
5 and the *City of Charleston* tell us that those intervening
6 decisions by the doctors defeat proximate causation, even as
7 to lawful prescription opioids clearly defeat proximate
8 causation as to the even more remote point about illegal
9 drugs.

10 But, second, even putting that aside, the claimed harms
11 from illegal drug use are clearly too remote from the
12 description -- from the distribution of prescription
13 opioids. There are clearly multiple independent steps that
14 occur after distributors deliver prescription opioids to a
15 pharmacy.

16 A pharmacy -- a doctor prescribes. A pharmacy
17 dispenses. Once the pills are out in the community, as
18 we've discussed, the pills are then diverted to an illicit
19 use. Pills are misused. Follow the plaintiffs' theory
20 through.

21 Then they say, well, that misuse leads to later illegal
22 drug use. Well, that involves a crime of misuse of the
23 prescription opioids followed by a crime involving drug
24 trafficking followed by a crime involving drug dealing
25 followed by a crime involving drug, drug purchasers, drug

1 users, intravenous drug users and others who illegally
2 acquire the drugs.

3 And, again, *City of Charleston* and *Employer Teamsters*
4 establish that these multiple criminal acts defeat proximate
5 causation.

6 And I wanted to highlight in particular the second
7 quotation on the right-hand side from Judge Copenhaver where
8 he said, "Defendants' actions are too attenuated and
9 influenced by too many intervening causes, including the
10 criminal actions of third parties, to stand as the proximate
11 cause of plaintiffs' injuries."

12 That's the exact same point we're making here, Your
13 Honor. It's the exact same reasoning. It's the exact same
14 issue.

15 We have multiple steps in the chain. Even if you
16 assume that the plaintiffs are right, even if you assume
17 that they're right, that there's gateway, it requires
18 multiple intervening criminal acts before you get there.
19 And that defeats proximate causation.

20 Your Honor, that's what I wanted to address to the
21 Court today. And as I indicated, we will have a brief
22 following up on this argument later today. Unless the Court
23 has more, I'll pass it on to my colleagues.

24 THE COURT: All right. Thank you, Mr. Hester.

25 MR. HESTER: Thank you, Your Honor.

1 THE COURT: Mr. Nicholas, you may proceed.

2 MR. NICHOLAS: Thank you, Your Honor. Good
3 morning.

4 On behalf of AmerisourceBergen, we move for judgment on
5 partial findings pursuant to Rule 52.

6 Mr. Hester has just gone through the fact that there
7 was no evidence of proximate causation established against
8 any of the defendants in this case and we strongly agree.

9 I would like to address something separate. What I'd
10 like to address is the total absence of any proof of
11 wrongful conduct on the part of my client,
12 AmerisourceBergen.

13 We're past the rhetoric stage. We're past the
14 allegations stage. I'm going to restrict my comments and my
15 stuff to the evidence that's in the record and the evidence
16 that's not in the record.

17 THE COURT: Is wrongful conduct under a nuisance
18 theory an essential element?

19 MR. NICHOLAS: I believe the essential element
20 under a nuisance theory is, is -- yes, I think wrongful
21 conduct has to be established. And I think that means that
22 unreasonable conduct has to be established.

23 And I want to start with our customers.

24 One of the first things I did in my opening statement
25 was to put up a slide that displayed AmerisourceBergen's

1 customers in the City of Huntington and Cabell County.

2 If there was going to be any suggestion of bad conduct
3 on our part, it would have had to have had something to do
4 with these customers. They were our only connection in the
5 area. But they were hardly mentioned. And, certainly,
6 there was nothing negative. There wasn't a negative word
7 uttered.

8 Mr. Rafalski, their SOMS expert, their conduct expert,
9 did not say a single word about our customers and, in fact,
10 didn't say anything specific about our programs at all.

11 Mr. Rannazzisi, who was in charge of diversion control
12 for our regulator, the DEA, for the relevant years did not
13 mention a single AmerisourceBergen customer.

14 The only person that the plaintiffs called -- the only
15 expert that they called who said anything at all on the
16 subject of AmerisourceBergen's customers was Lacey Keller,
17 another expert who talked about two AmerisourceBergen
18 customers. Both were Walgreens stores.

19 And what did we learn? What did she say? What was the
20 outcome of her testimony? It was that only a fraction of
21 one percent of the prescriptions filled at those two
22 Walgreens stores were for licensed doctors who later had --
23 who later had actions brought against them by the Board of
24 Medicine, a fraction of one percent. And that was it. That
25 was the sum total of the evidence about our customers, full

1 stock.

2 The plaintiffs, however, also called -- they chose to
3 call four AmerisourceBergen company witnesses as of cross.
4 It was their choice to do that. They had them on the stand
5 for days you will recall. And it's a while ago, but they
6 had them on the stand for days.

7 But there was hardly any cross-examination about our
8 customers of those -- of our witnesses. And there was
9 certainly no negative testimony.

10 In fact, the only person in this entire case who had
11 any first-hand knowledge of our customers in Cabell County,
12 it was only one. And that was Mike Perry, our sales
13 representative.

14 And to remind the Court, and it has been a while, he is
15 the person who spoke -- he's the person who spoke with a lot
16 of emotion about the City of Huntington. He's the person
17 who self-described as a Son of Marshall, Son of Marshall
18 University.

19 He described several of the stores on the list I showed
20 you in great detail. He described the premises. He knew
21 the pharmacists in charge. If there was to be any evidence
22 of missed red flags, he was the one to ask. And the
23 plaintiffs did not ask.

24 Meanwhile, there was positive testimony. Every one of
25 AmerisourceBergen's customers was licensed by the DEA,

1 licensed by the West Virginia Board of Pharmacy during all
2 of the time that we serviced them. This was confirmed by,
3 among others, the plaintiffs' expert, Craig McCann.

4 And I don't need to read this. It's very clear. We
5 reported -- in addition, we reported suspicious orders for
6 these pharmacies. And no one disputes that. No one
7 disputes that.

8 And Mr. Rafalski, the plaintiffs' diversion control
9 expert, confirmed it. The plaintiffs did not identify a
10 single order that we should have reported as suspicious but
11 did not, not a single order.

12 And, finally, AmerisourceBergen reported every order of
13 prescription opioids that it shipped to customers in Cabell
14 County and the City of Huntington to the DEA.

15 THE COURT: Well, wasn't there evidence of
16 failures of the specific order -- of suspicious order
17 reporting system that the plaintiffs claim should have been
18 noticed and -- by the defendants and did the -- assuming
19 that's correct, did the defendants have a responsibility to
20 do anything about that, if you understand my question?

21 MR. NICHOLAS: Well, I, I don't believe there --
22 well, I'm not sure I understand your question. Ask me
23 again.

24 THE COURT: Well, it was very inarticulate.

25 MR. NICHOLAS: No, that's not true. I'm just

1 not --

2 THE COURT: If I understand it correctly, there
3 was evidence of the failure of the suspicious order
4 reporting system that the plaintiffs claim the defendants
5 should have recognized.

6 If that's true, did the defendants have a
7 responsibility to do anything about that --

8 MR. NICHOLAS: Okay.

9 THE COURT: -- rather than just keep shipping
10 pills?

11 MR. NICHOLAS: Well, I think there was absolute --
12 there was no evidence of a failure -- of failure of any of
13 the -- of our system or any of these systems, certainly
14 ours.

15 And, certainly, such failures -- and, in fact, the
16 evidence is all to the contrary. And I have -- I move to
17 this in about three minutes in my, in my presentation.

18 But, basically, I think what we're -- what I'm trying
19 to say in a nutshell here is that there's only two ways I
20 can think of to look at the conduct issue in this case.

21 One, was there any evidence of misconduct or bad
22 conduct in Cabell -- that, you know, attributable to us in
23 Cabell or Huntington. And the answer to that -- and that's
24 why I'm going through, that's why I'm emphasizing the
25 customer -- is "no."

1 The other -- so, so I think the plaintiffs are
2 defaulting to, you know, plan B, argument B which is that
3 there was some sort of systemic failure with our system that
4 we should have corrected. But there's no evidence -- there
5 is no evidence of that. In fact, the evidence is to the
6 contrary.

7 The DEA -- you know, our regulator -- and, you know,
8 I'm jumping ahead of my own outline here. Everything that
9 they did, everything that they said speaks to the contrary.
10 And there's just no evidence of a failure.

11 And the only thing the plaintiffs are pointing to
12 really in this case when you boil everything down is volume.
13 That's it. That's their argument. There were just too many
14 pills full stock.

15 But Mr. Hester has just addressed that. You know, he
16 has just addressed the fact that the number of pills is, is
17 purely and 100 percent a function of the number of
18 prescriptions. And then we roll right back into the
19 argument on proximate causation and the standard of care.

20 But -- so, so I, I don't think that there was any
21 evidence, any credible evidence, any evidence at all,
22 actually, presented of a failure of AmerisourceBergen's
23 system.

24 The irony here, the irony here -- because I do think
25 that the only thing the plaintiffs are really pointing to as

1 a failure is volume itself. The irony is that the evidence
2 as to the number of pills shipped into Cabell and Huntington
3 and, for that matter, anywhere in the country, all came from
4 our own ARCOS reporting to our regulator, the DEA.

5 So the evidence of volume was not new. It's not on --
6 it's not new. It isn't uncovered. It isn't discovered.
7 The DEA has always had it. These figures were well-known
8 before this trial even started. That's not what this case
9 is about. And they were known by the entity that mattered
10 the most, our regulator.

11 And the dispositive undisputed fact about volume is
12 this: The number of pills distributed matched the number of
13 pills prescribed one to one. They were mirror images.
14 Witness after witness said this.

15 Mr. McCann: "And the fact that prescribing in Cabell
16 County peaked in 2009 is entirely consistent with your
17 countless opinions that distribution peaked -- that
18 distributions peaked in 2009; correct?"

19 "Correct. That's what I say. They're two sides of the
20 same coin."

21 Lacey Keller: "Again, they're two different sides
22 of -- one is shipments and one is prescriptions, but they --
23 for that time period, we both arrived at about the same
24 number of pills per person."

25 And to close the loop on this, none of the witnesses

1 was prepared to say that AmerisourceBergen should have tried
2 to second-guess the doctors who prescribed these
3 medications.

4 We can go to the next slide.

5 "You cannot say --" question to their expert: "You
6 cannot tell this Court --" I'm sorry. Let's see. Yeah.
7 Sorry. I got myself mixed up and lost.

8 THE COURT: Well, that was my fault, I think,
9 because I jumped you ahead, --

10 MR. NICHOLAS: That's all right.

11 THE COURT: -- ahead of your scorecard there.

12 MR. NICHOLAS: It's my fault for not being
13 quick-witted enough. I, I skipped a step here. And this is
14 the step I skipped.

15 None of the plaintiffs' experts was able to say what
16 the right number of pills should have been. And this is
17 extremely important. None of them actually even said that
18 the wrong number of pills had been shipped. And how could
19 they since they lined up one to one with the prescriptions?

20 Question to Dr. McCann: "You cannot tell this Court
21 how many prescription opioids should have been distributed
22 to Cabell County or the City of Huntington; correct?"

23 "Correct."

24 "You cannot say whether or not all the charts you
25 showed over the last day and a half show over-supply or

1 under-supply; correct?"

2 "Correct."

3 Next slide, Lacey Keller: "But I don't offer the
4 opinion of what should be the volume."

5 Question: "And if you're asked to identify the amount
6 of opioid pain medication that should have been prescribed
7 in Cabell County, that would be outside your area of
8 expertise to answer; correct?"

9 "I could tell you what was prescribed but not what
10 should have been prescribed."

11 And no one told us, no one told us what should -- that,
12 that the number -- that the pills that were prescribed were
13 wrong or what else should or shouldn't have been prescribed.

14 And now to close the loop on this, none of the
15 plaintiffs' witnesses was prepared to say that
16 AmerisourceBergen should have tried to second-guess the
17 doctors who prescribed these medications.

18 And this is the testimony from Dr. -- from Mr.
19 Rannazzisi that so states. He's the person to ask. This
20 was his answer. And I believe Mr. Hester already showed
21 this to you.

22 So now I'm going to -- now I'm rounding into an answer
23 to the question you asked me about five minutes ago I think,
24 I hope.

25 So the plaintiffs have failed to show any failures on

1 the part of AmerisourceBergen in Cabell County and in the
2 City of Huntington. Their fallback was to try to suggest
3 that there were systemic failures at AmerisourceBergen, but
4 there was no evidence of it. They did not deliver anything
5 to you.

6 In fact, the evidence at trial paints an extremely
7 positive picture of AmerisourceBergen throughout these years
8 in broad strokes, Your Honor, in broad strokes. From 1998
9 to 2007 ABDC -- AmerisourceBergen operated a program that
10 was approved by the DEA. Okay.

11 The DEA worked with us on this program for two years
12 leading up to the approval, and the approval was in writing.
13 And we've seen the writing. Mr. Zimmerman testified about
14 this at length.

15 During this same time period -- during this period
16 between 1998 and 2007, AmerisourceBergen trained DEA's
17 diversion investigators at the -- at AmerisourceBergen's
18 distribution center. Mr. Zimmerman and Steve -- and Mr.
19 Mays testified about this.

20 You will -- you have heard that in 2007
21 AmerisourceBergen's Orlando, Florida, distribution center
22 was suspended for a few months. That -- and this I think is
23 the only snippet of evidence that the plaintiffs will try to
24 use to suggest anything wrong with our systems. This is it.

25 This does not establish civil -- this 2007 action does

1 not establish civil liability in a lawsuit brought by two
2 political subdivisions in West Virginia that we are hearing
3 in 2021, 14 years later. And I'll pause on this to make
4 just a couple of more points.

5 First, the distribution center in question in Orlando
6 did not ship product or pills into Huntington or Cabell
7 ever.

8 Second, there's no admission of liability.

9 Third, the suspension was short and was partial.

10 Fourth, the suspension was in 2007, 14 years ago.

11 And, fifth, most importantly, this did not even result
12 in a fine. AmerisourceBergen has never been fined by the
13 DEA. And that is one way of answering the question that you
14 asked.

15 And what happened afterwards is just as important and
16 just as responsive to your question because
17 AmerisourceBergen as an outgrowth of this 2007, you know,
18 situation created a new program with input from the DEA that
19 the DEA had AmerisourceBergen present at its, at its
20 industry conference.

21 That happened in 2007. We did it again with the DEA in
22 2009. And the description of those two presentations is
23 still on the DEA's website to this day.

24 Where is the evidence, where is the evidence that there
25 was any kind of failure, systemic failure, systemic or

1 otherwise or anything wrong with our program when you --
2 particularly when you juxtapose it with all the positive
3 feedback, positive reinforcement we were getting from our
4 regulator, the DEA, during all of these years? What we were
5 hearing, in essence, was, "You're -- this is good. You're
6 doing great. We agree. Let's show the industry."

7 And since I don't know what time it is, I'm going to,
8 I'm going to just show you one more slide. Okay?

9 THE COURT: You go ahead.

10 MR. NICHOLAS: Mr. -- and this is testimony that
11 Mr. Rannazzisi -- that the plaintiffs elicited during the
12 trial. Plaintiffs elicited this.

13 Question to Mr. Rannazzisi: "Mr. Rannazzisi, did the
14 DEA bring additional actions against AmerisourceBergen
15 during your tenure as Deputy Assistant Administrator?"

16 This was -- timing wise, the question was anything
17 after, anything after 2007.

18 Answer: "I don't recall any additional actions against
19 AmerisourceBergen."

20 Question: "And was the fact that DEA, to your
21 knowledge, did not initiate an enforcement action against
22 AmerisourceBergen a sign that you had found or that the DEA
23 had found AmerisourceBergen's compliance -- a sign that you
24 had found or that DEA had found AmerisourceBergen's
25 compliance with the Controlled Substances Act?"

1 Now, he said, "No," but then he went on to say the
2 following: "The fact that there was no enforcement action
3 doesn't mean they were compliant, doesn't mean they weren't
4 compliant."

5 I'll stop there to say that is not proof. They have
6 showed you nothing.

7 "We just didn't --" he goes on to say, "We just didn't
8 have -- during our, our investigations, they did not come
9 up," since 2007.

10 Look, Mr. Rannazzisi -- Mr. Rannazzisi was our
11 regulator. We are one of the -- we are one of the three
12 largest distributors of all healthcare products in the
13 country. He knows who we are. He knew where -- he knows --
14 he knew where we lived. He knew every shipment that we made
15 within two days of our making it.

16 If there was any evidence that we were doing something
17 wrong systemically, if there was any evidence that there was
18 anything wrong with our systems after 2007, this guy would
19 have found it and this guy would have been the first to tell
20 you about it.

21 I appreciate the opportunity to have spoken to Your
22 Honor. Thank you very much.

23 THE COURT: Thank you, Mr. Nicholas.

24 We need to switch court reporters. It's a little
25 early, but this might be the best time to do it. Our relief

1 pitcher is in the courtroom I see.

2 (Recess taken at 9:42 a.m.)

3 THE COURT: Good morning, Mr. Heard.

4 MR. HEARD: Good morning, Your Honor. When I've
5 had the pleasure of addressing you before, it's been on
6 behalf of all the distributors. But this morning, as is
7 appropriate, I think, at this stage of the case, I'm here to
8 speak only on behalf of Cardinal Health and to present our
9 motion under Rule 52(c) for judgment.

10 And, Your Honor, this morning, I want to address really
11 three topics, not surprisingly. First, that the plaintiffs
12 have failed to prove that Cardinal acted unreasonably.
13 After all, they have a public nuisance claim and they need
14 to prove that there was an unreasonable interference with
15 the public right.

16 THE COURT: Is that a necessary element of a
17 nuisance claim, in your view?

18 MR. HEARD: It is. They have to prove we acted
19 unreasonably, an unreasonable interference. And, Your
20 Honor, in an appendix that we'll supply with our brief,
21 we're going to ask you respectfully to re-visit one element
22 of the standard, but for purpose of this morning, we're
23 going to assume that it's the standard of unreasonableness
24 and we're going to show you the way you cut and slice this
25 by time period, pre-2007, 2007-2010, or 2010 to the current,

1 they have failed to prove that we acted unreasonably.

2 If you look at the components of our Anti-Diversion
3 System about which Mr. Mone testified you'll see that Mr.
4 Rafalski didn't criticize those components. And then I'm
5 going to come to Your Honor's question, which I think goes
6 to this suggestion that we did not do adequate due diligence
7 of suspicious orders and I think we're going to find that
8 there's not evidence. There was artful questioning.

9 The second bucket that I want to address is the
10 question of causation. We adopt everything that Mr. Hester
11 said and he's absolutely right about the proof of proximate
12 causation. But one might say even more fundamentally
13 there's a failure to prove cause in fact in this case. By
14 cause in fact I mean there's no proof in this case that had
15 Cardinal Health done more due diligence, had it blocked more
16 orders, had it reported more orders, that it would have
17 affected in any way or diminished by one pill the volume of
18 prescription opioids coming into Cabell-Huntington.

19 That is a fundamental failure of causation and this
20 isn't a question, Your Honor, of weighing the evidence.
21 There is no evidence. No witness even addressed the
22 question.

23 And, finally, I want to address a series of questions
24 that go to the power of the Court when it is sitting in
25 equity. These are questions of equity jurisdiction and I'd

1 like to show Your Honor at the end of this time that the
2 federal law is quite clear that when the federal court is
3 sitting in equity it lacks the power to grant equitable
4 relief if there is a remedy at law. And there is a remedy
5 at law, and plaintiffs acknowledge that there is a remedy at
6 law, for the \$2 billion dollars in abatement relief that
7 they seek for medical treatment.

8 Secondly, the federal court sitting in equity lacks the
9 power to grant monetary relief when that monetary relief is
10 not adjunct to some traditional form of equitable relief
11 like an injunction, restitution, disgorgement, et cetera.
12 The plaintiffs have not cited in the four years of this
13 litigation a single case in which a federal court has done
14 what they are asking you to do. We'll come back to that.

15 And, lastly, a fundamental principle of equitable
16 relief is that the Court narrowly tailors the remedy to the
17 wrong and the abatement plan that was presented on Monday is
18 quite clearly cut from whole cloth. It's not tailored in
19 any way whatsoever.

20 So, that's where we want to go and let me start with
21 this question of whether they have met their burden of
22 proving that Cardinal acted unreasonably and, ironically,
23 the proof at trial maps on to plaintiffs' opening statement
24 because in plaintiffs' opening statement there was not a
25 single mention of Cardinal's conduct vis-a-vis a single

1 pharmacy customer in Cabell-Huntington, much as was the
2 case, as Mr. Nicholas says, with ABDC.

3 Cardinal has 37 pharmacy customers in
4 Cabell-Huntington. 27 of those were never mentioned in this
5 trial. Ten of them were mentioned only by Dr. McCann, who
6 had no opinions about them. He mentioned them only in the
7 form of presenting a data summary sheet.

8 Mr. Rafalski, the one witness who testifies about
9 Cardinal's conduct, mentioned only one pharmacy customer,
10 Medicine Shoppe, and here is the anodyne testimony that Mr.
11 Rafalski gave about Medicine Shoppe at Page 72 and 73 of his
12 direct examination. And this was in the context of taking
13 an ingredient limit report, one of those reports that was
14 used to report orders in excess of the threshold, and after
15 going through this report to just show the various blanks
16 that are filled in, this was the set of summary questions,
17 and this is all that was said about a pharmacy by name.

18 Question: So, using this exemplar, The Medicine Shoppe
19 would be a pharmacy, correct? Answer: That's correct. And
20 it made orders from Cardinal Health? That's correct.

21 Question: All of those orders got shipped that are on
22 that list? Answer, that's correct. Those orders, either on
23 a monthly or quarterly basis, the transactions would be
24 reported to the ARCOS database, correct? Yes.

25 Question: And because the orders for that month from

1 this pharmacy exceeded four times the average this pharmacy
2 got included in the excess purchase report sent to the DEA?
3 Answer: That's a correct statement, Your Honor.

4 That's the only testimony in this case by name about a
5 pharmacy customer.

6 The reason for this, I believe, Your Honor, is, as Mr.
7 Hester and Mr. Nicholas have both said, the plaintiffs told
8 us in their opening statement that the first pillar of their
9 case was volume. And the syllogism that they seem to have
10 offered the Court is that the volume appeared to be
11 unreasonable, unreasonably large, and Cardinal's conduct was
12 unreasonable.

13 That's not a logical syllogism at all. It skips over
14 any proof of actual wrongful conduct. And, as my colleagues
15 have said, what was established, and established in the
16 first week of trial, is that it's not supply that drives
17 demand. It's demand that drives supply. And the demand is
18 doctors' prescriptions and doctors' prescriptions went up
19 and up and up over this time period because the standard of
20 care changed.

21 And you've -- you've seen in their slides and so I
22 won't repeat the testimony from Dr. Waller, the very first
23 witness, that that was the general gestalt.

24 Doctor Gupta, that that was the understanding. That
25 was the culture. That was the influence.

1 Dr. Werthammer, Dr. Werthammer who testified candidly,
2 even ruefully, I guess, saying, unfortunately, it was not
3 big pharma who wrote the prescriptions. It was me and my
4 colleagues.

5 And Mr. Rafalski, who testified, I think inadvertently,
6 not recognizing what he was saying, he said the overwhelming
7 majority of physicians who prescribe controlled substances
8 do so in a legitimate manner. And here's the important
9 part. That will never warrant scrutiny by federal or state
10 law enforcement officials.

11 Mr. Rannazzisi, of course, put a number on that
12 overwhelming majority. It was 99.5 percent of doctors he
13 told Congress that were prescribing appropriately and it
14 just beggars logic to say that if 99.5 percent of doctors
15 are prescribing appropriately that pharmacies can be faulted
16 for filling those prescriptions or distributors like
17 Cardinal Health can be faulted for filling the orders so
18 that pharmacies can fill those prescriptions.

19 After all, you will remember that Mr. Rannazzisi said I
20 couldn't cut the quota because it was important to fill
21 doctors' prescriptions so patients who needed the drugs
22 would get them.

23 So, plaintiffs say this is all about volume and they
24 say it's all about volume because their claim is that
25 there's more volume, there may be more diversion. But

1 here's the important thing where Cardinal is concerned.
2 There is no evidence in this trial that Cardinal ever
3 distributed a single pill outside the Closed System of
4 Distribution. It never distributed a pill to a pharmacy
5 that was not licensed.

6 And the 37 pharmacy customers of Cardinal's never
7 dispensed a pill other than to fill a doctor's prescription
8 and there is precious little evidence in this case, Your
9 Honor, that any doctor in Cabell-Huntington prescribed
10 outside the standard of care against the prevailing standard
11 of care.

12 Reference has already been made this morning to Dr.
13 Keller's testimony. She told the Court that there were more
14 than 500, 500 doctors, in Cabell-Huntington who prescribed
15 opioids. She rendered an opinion about none of them. She
16 said that three of them had been disciplined at one time or
17 another by the Board of Medicine, but of those three out of
18 500, there was only one who had patient prescriptions that
19 were filled at a Cardinal pharmacy health customer and that
20 doctor at that pharmacy accounted for 0.2 percent of the
21 pharmacy's prescriptions, two out of every one thousand.

22 So, the only evidence of diversion in this case is the
23 general truism that there is diversion if there are too many
24 pills being prescribed and there are too many sometimes left
25 in the medicine cabinet, medicine cabinet diversion, as Mr.

1 Hester said.

2 But critically for Cardinal's motion, there is no
3 evidence that connects any action of Cardinal with any act
4 of diversion. And that's because the diversion, as we know,
5 comes after it's left Cardinal's hands, after it's left the
6 pharmacy's hands, after sometimes it's left the patient's
7 hands.

8 So, let's turn to Mr. Rafalski, the one witness who
9 presumably says something about Cardinal's conduct. We have
10 articulated in a motion why we think the Court should strike
11 this testimony under *Daubert*, but apart from that, his
12 testimony is not credible. It's entitled to no weight for
13 two big reasons.

14 And the first reason, Your Honor, is this complete
15 willful blindness about the historical conduct in which all
16 of these events occurred. If we're going to answer the
17 question of whether Cardinal Health or any other distributor
18 acted unreasonably, we have to look at it in a historical
19 context and, as my colleagues have indicated, that is, you
20 heard from Drs. Waller and Gupta and Werthammer and Yingling
21 the standard of care changed.

22 And what I want to underscore is this. Not just that
23 we have individual doctors who recognize that the standard
24 changed, but that for a period of a decade or so this
25 understanding of prescribing opioids, that it was okay to

1 prescribe them long-term for chronic pain, was a pervasive
2 understanding. It was the conventional wisdom. It was, to
3 use a somewhat pejorative term, group think. And group
4 think has great power.

5 And the evidence that this was group think is that you
6 heard in the first week of trial from the first witness that
7 the West Virginia Board of Medicine sent this booklet,
8 Responsible Opioid Prescribing, to every doctor in West
9 Virginia. In retrospect, the plaintiffs would highlight
10 this book in their complaint and say this is what caused
11 prescriptions to skyrocket.

12 You heard testimony about the Joint Commission and the
13 fifth pain as a fifth vital sign and, in retrospect, the
14 plaintiffs, the City of Huntington, at least, files a
15 complaint saying that the Joint Commission's endorsement and
16 use of pain as a fifth vital sign is a criteria for hospital
17 accreditation caused prescriptions to skyrocket.

18 And, of course, most saliently, it's the DEA. The DEA
19 endorses the Federation of State Medical Board guidelines.
20 It reports to Congress that 99.5 percent of doctors are
21 prescribing appropriately. It raises the quota 39-fold over
22 a 15-year period.

23 I say this not because this is to blame the DEA, not at
24 all. It is to underscore the historical conduct -- context
25 in which this prescribing takes place, that there is a

1 powerful conventional wisdom at work, so that even the
2 regulators and the quasi regulators like the Joint
3 Commission at state and federal level are all part of this
4 view that the standard of care has changed.

5 And if 99 percent of doctors are prescribing
6 appropriately, how can 90 percent of the orders be
7 suspicious and should have been flagged? That is a
8 jerry-rigged reverse engineering methodology that Dr.
9 Rafalski has provided and it shows a willful blindness to
10 historical conduct in which prescriptions and distributions
11 were being made.

12 But the second big problem and the reason why Rafalski
13 is entitled to no weight is let's break this down into the
14 time periods. Pre-2007, all of the distributors, all of
15 them; not just these three, all of them nationwide, are
16 reporting suspicious orders and shipping the drugs.
17 Reporting them and, in Cardinal's case, doing limit reports.

18 You heard through Mr. Rafalski that agents of the DEA
19 testified in federal court in the Eastern District of
20 Michigan before Judge Lawson saying the DEA was aware of
21 this practice and approved it. And who is seated at counsel
22 table as that testimony was given? None other than James
23 Rafalski. So, before 2007, we know that everyone is
24 performing a system that's in accord with DEA understanding
25 expectation and with their approval.

1 Post-2007, what does Cardinal do when the DEA, along
2 with ABDC, sponsors a presentation telling all distributors
3 this is the way you should now model your system? We know
4 there's no golden rule, no one way it's supposed to be done,
5 but DEA stood up on the stage with ABDC and said to
6 everyone, this is a good system, and Cardinal goes out to
7 modify its system accordingly and you heard from Mr. Mone
8 what Cardinal did.

9 Did you hear any criticism from Mr. Rafalski about, A.,
10 the person that Cardinal chose to lead this modification,
11 mastermind Mone, a pharmacist, a lawyer, a former regulator
12 in the State of Kentucky? You did not.

13 Our modified system had three major components, know
14 your customer, analytics for setting thresholds,
15 investigations, broadly, broadly stated.

16 Did you hear any criticism from Mr. Rafalski that under
17 our know your customer component that there was any customer
18 that we approved that we should not have approved? No, you
19 did not.

20 Did you hear any testimony there was a customer that we
21 should have terminated that we did not? No. There was no
22 such testimony.

23 The analytics component, the data driven analytics
24 component for setting thresholds, did you hear about a
25 single pharmacy customer that we set the thresholds wrongly

1 or adjusted them wrongly? You did not.

2 The investigations component, did you hear any
3 criticism of who we hired as investigators? Mr. Mone talked
4 about former DEA agents, former police, former FDA
5 investigators. Did you hear any testimony we hired the
6 wrong people? No.

7 Did you hear any criticism we didn't hire enough
8 people? No.

9 Did you hear any criticism we didn't train them well
10 enough? No.

11 All you heard was that there was a claim that we failed
12 to do adequate due diligence of suspicious orders and I
13 would imagine that was where Your Honor's question was
14 coming from and I will submit to you that what you heard was
15 not evidence, but artful questioning, because here's what
16 Mr. Rafalski was asked on direct examination:

17 Were you asked to review the due diligence files? Have
18 you gone through customer files? Not have you found that
19 there is affirmative proof that Cardinal Health did not do
20 due diligence, but did you find evidence sufficient to
21 dispel your suspicions.

22 But he walked it all back on cross because, when Mr.
23 Schmidt asked him direct questions, have you looked at those
24 initial orders you flagged, he hadn't looked at them.

25 Did you individually review them to see if they were

1 suspicious? I did not.

2 Did you review the due diligence files for these
3 flagged orders? Well, some.

4 Didn't review all of them? No. Just some.

5 And then further, when he was impeached with his
6 deposition testimony, can you say anywhere between 0 and
7 100 percent how many Cardinal Health, or McKesson, or ABDC?
8 I don't have a definitive answer.

9 And why not? It's not something he even tried to
10 evaluate.

11 So, here's what he didn't do. He didn't review all of
12 Cardinal's due diligence files, only some.

13 He didn't even review the pharmacy orders that were
14 flagged by his methods. He didn't review his initial ones.

15 He doesn't know how many Cardinal investigated because
16 it's not something he tried to evaluate.

17 That's just dodging testimony, Your Honor, and it has
18 -- should be accorded no weight. That's a dodging
19 methodology to begin with and his implementation is he
20 doesn't even look to see.

21 And we have to the contrary Mr. Mone's testimony that
22 Cardinal did evaluate every suspicious order; that is, every
23 order that was flagged for being over the threshold, and
24 held the order and did not ship it until they had satisfied
25 it was okay to do so.

1 The only other thing Mr. Rafalski had to say was, well,
2 I didn't see a lot of due diligence files. Well, you know,
3 we produced records going back to 1996. These records were
4 20 years old by the time the plaintiffs asked for them. And
5 the important fact is that DEA has never imposed any record
6 retention requirement for due diligence files and, notably,
7 it does establish such requirements for other files but not
8 these.

9 So, Your Honor, I would suggest there is a complete
10 failure of proof on the plaintiffs' part. And on the other
11 side, there's Mr. Mone's quite consistent testimony about
12 what they did. And here's more detail.

13 Cardinal hired a good person to change the system.
14 We've modeled our system after one DEA sponsor. Mr. Mone
15 testified at length that he briefed the Chief of the Office
16 of Diversion on this. And when I sa briefed, he didn't just
17 call her on the phone or go to the DEA Office for a
18 half-day's meeting.

19 She came to Dublin, Ohio for a week with investigators
20 while he presented this system. And then they cooperated
21 with DEA investigators, who went to various of our
22 distribution centers and did a deep dive. All of that
23 stands in contradiction of Mr. Rafalski's superficial
24 testimony about due diligence.

25 And I should underscore this. I said at the beginning,

1 there is not a single statement about a Cardinal pharmacy
2 customer. There's not a single mention in this trial of the
3 Wheeling Distribution Center, the one Cardinal Distribution
4 Center that supplies all these drugs to our customers in
5 this area. No criticism of the Wheeling Distribution Center
6 by any witness and the fact is no criticism at any time from
7 the DEA or state regulators.

8 So, Your Honor, I submit they've failed to prove their
9 case about reasonableness.

10 Now, let's turn to causation for a second.

11 As I say, we adopt what Mr. Hester has to say about
12 proximate cause. But there is, in a way, a predicate
13 question about cause and effect. And there are three
14 questions here that the plaintiffs had to have answered.

15 The first is if Cardinal had done more due diligence,
16 or different due diligence, or better due diligence, would
17 it have then blocked more orders?

18 Secondly, if it had blocked more orders, would that in
19 any way have affected the supply coming into
20 Cabell-Huntington?

21 If Cardinal had reported more orders to the DEA, would
22 the DEA have done something differently? As I say, there is
23 no witness in the case, not Mr. Rafalski and no one else,
24 even addressed those questions. There is no evidence
25 whatsoever to prove what plaintiffs must prove, which is

1 that Cardinal's allegedly unreasonable conduct was a cause
2 and fact of the harm. And all the evidence, Your Honor, is
3 to the contrary and this question and answer captures it.

4 I don't know what I did to make this blip on the screen
5 and I apologize.

6 But did he ever look to see how many doctors were
7 prescribing legitimate? If we had done a deep dive, a due
8 diligence dive that the law doesn't even require us to make,
9 no, I didn't conduct any research on that.

10 If we had done a deep dive to go, you know, every --
11 every pharmacy, boots on the ground, which we're not
12 required to do, he doesn't have any -- he didn't have any
13 opinion about that.

14 And we know that if we had even done some fly on the
15 wall, fly on the wall of the doctor's office, that that's
16 where we've been, what and we would have known is that
17 99.5 percent of doctors were prescribing appropriately.

18 So, the evidence is to the contrary about whether more
19 due diligence would have caused us to block more orders.
20 Would blocking more orders have led to fewer pills coming
21 into Cabell-Huntington?

22 Well, Judge, there are more than 30 wholesale
23 distributors and the ones who have small pieces of the
24 market are always trying to poach business from Cardinal,
25 and McKesson, and ABDC.

1 And you heard testimony about the A Plus Pharmacy, the
2 pharmacy where the owner was sent to jail. It wasn't
3 supplied by any of the defendants in this case. It was
4 supplied by Miami-Luken, who's standing by to supply the
5 pills if Cardinal, or McKesson, or ABDC cuts off a customer.
6 Cutting off a customer wouldn't have changed the supply,
7 only the DEA, as Mr. Rafalski acknowledged, could do that.

8 And, finally, had we reported no orders, would that
9 have made a difference? Well, you've heard the testimony.
10 The plaintiffs say this case is about the volume of opioids.
11 We reported accurately every transaction to every pharmacy.
12 The DEA had the information about volume. It knew the total
13 volume going to each pharmacy and every pharmacy in the city
14 and every pharmacy in the county and it saw no reason to
15 take action because it believed that 99.5 percent of doctors
16 were prescribing appropriately.

17 So, not -- the plaintiffs haven't even proven cause in
18 fact and they haven't proven proximate cause. And I add
19 this slide only to underscore what Mr. Hester says. There
20 is no reported case in which there have been this many steps
21 standing between our conduct and the plaintiffs' harm and
22 not, not been held to be too indirect and too attenuated to
23 support proximate causation. And, of course, these steps
24 are punctuated by illegal conduct and professional
25 judgments. So, we submit, Your Honor, they haven't proved

1 cause any more than they proved that we acted unreasonably.

2 And, finally, Your Honor, when we come to the question
3 of their abatement remedy, it takes quite a number of pages
4 in our brief, you will find it discussed fully there, but
5 I'll -- I'll ameliorate it here.

6 The first major obstacle is that the Court has no power
7 to grant equitable relief when there's an adequate legal
8 remedy at law. Your Honor knows that we have -- we have
9 complained from the beginning that the plaintiffs' concept
10 of abatement is all wrong and we've swung the hammer at that
11 nail a few times. I think you'll see in the brief now that
12 we can hit the nail squarely on the head.

13 And beginning with the Supreme Court's decision in
14 *Guaranty Trust v. York* in 1945, an opinion written by
15 Justice Frankfurter, the Court has said that regardless of
16 state law, when the federal court is sitting in equity, it's
17 governed by federal common law and the federal court always
18 must insist on finding there is no adequate remedy at law.

19 And the \$2 billion dollars that plaintiffs seek for
20 medical treatment is classic damages. It is future costs
21 for personal injury.

22 And so, Mr. Barrett, on Tuesday when he testified, was
23 not misspeaking when several times he referred to the
24 abatement plan as a life care plan. It is a life care plan.
25 It's the same life care plan he does in personal injury

1 cases for damages all the time.

2 The case we're going to ask Your Honor to look at very
3 closely is this case decided in August, 2020 by the Ninth
4 Circuit. The case relies on the legal principle I've just
5 discussed with you and the facts are uncannily like those
6 here. And this is the Court's summary in one of the
7 introductory paragraphs of what happened;

8 On the brink of trial, after more than four years of
9 litigation, plaintiff dismissed her damages claim and chose
10 to proceed with only equitable remedies. Just like here.

11 A singular and strategic purpose drove this maneuver to
12 have a bench trial rather than a jury trial. Just like
13 here, where the other strategic purpose, of course, was to
14 get out of the MDL as quickly as possible and have a trial.

15 Third, plaintiffs continued to seek \$32 million
16 dollars, but as equitable restitution rather than damages.
17 Just like here. Plaintiffs are still seeking the same
18 amount of money they've always sought.

19 The Court dismissed the claims for restitution, this
20 so-called equitable remedy, because an adequate remedy at
21 law, damages, was available. Confirmed by the Ninth Circuit
22 the District Court's holding on that ground.

23 And, Your Honor, that's exactly true here for the \$2
24 billion. Plaintiffs have an adequate legal remedy. They've
25 said so. They alleged it in their complaint.

1 When we moved to dismiss, they said we have a valid
2 damages claim. Even in opposing summary judgment on
3 abatement they insisted they had plenary power under the
4 municipal code to get any kind of relief.

5 And, of course, in the broader litigation the damages
6 claims have been sustained time and again. After all, the
7 State of West Virginia settled with these three defendants
8 for roughly \$75 million dollars for its damages claim.

9 The mass litigation panel denied our motion to dismiss
10 because they allege damages. The MDL court did the same.
11 So, they have an adequate remedy at law and, because of
12 that, they can't collect \$2 billion dollars in abatement
13 relief for medical treatment.

14 Now, the second problem they have, Your Honor, is that
15 there is a limitation on the Court's equity jurisdiction in
16 any case where you seek monetary relief that is not adjunct
17 to injunctive relief. Again, it's a large portion of the
18 brief that you will be receiving.

19 I will say only this, as I said in the beginning, after
20 four years of litigation, the plaintiffs still cannot cite a
21 single federal case in which a Court has done what they are
22 asking you to do.

23 If you're asking for \$2.6 billion dollars, I would
24 submit you need more than one case. It would be nice to
25 have an established line of authority, but they don't even

1 have one case.

2 And we take the 22 cases that they put in their
3 Memorandum of Law when they were seeking a bench trial and
4 the few additional cases in their summary judgment papers
5 and we take those out of the footnotes and we hold them up
6 to the light. And when you look at those 22 cases, not one
7 of them does what they're asking the Court to do and not
8 even one of them supports doing what they're asking the
9 Court to do.

10 So, I'll end with this, Your Honor. The problem with
11 the abatement plan, is there any more fundamental principle
12 of equitable relief than that the plaintiff has to show and
13 the Court has to narrowly tailor the remedy to the wrong?
14 Well, this plan that Dr. Alexander talked about on Monday
15 doesn't begin to be narrowly tailored.

16 Just consider this. You got addicted to opioids before
17 1990, before Purdue even began to market the drugs, before
18 there even was an opioid epidemic, and you're still alive
19 today? You're in the abatement plan.

20 If you lived all of your life in Las Vegas and got
21 addicted to opioids in Las Vegas, but you moved to West
22 Virginia in 2025, you're in the abatement plan.

23 You haven't even been born as of today and, as a
24 teenager in 15 years you get addicted to opioids, you're in
25 the abatement plan.

1 And if you've never used prescription drugs,
2 prescription opioids, and you get addicted to heroin in
3 2035, you're in Dr. Alexander's abatement plan because he
4 wasn't asked to create a plan that was in any way tailored
5 to the defendants' wrongful conduct or to the period in
6 which wrongful conduct occurred.

7 And if we were to try to break down this plan and
8 provide some analytical structure, we'd see it's not
9 narrowly tailored because the remedies have to do with
10 future addiction. Our -- our wrongful conduct stopped,
11 according to plaintiffs proof, in 2012.

12 They came into court in 2017, when I first argued
13 before Your Honor, and Mr. Majestro said, as of 2017, the
14 defendants are doing everything right now.

15 But this plan has millions, or tens of millions, or
16 perhaps hundreds of millions for future addiction. It seeks
17 to hold us responsible for the wrongs of others.

18 There's programs in here to educate doctors, re-educate
19 doctors in proper prescribing. We don't have any
20 responsibility for communicating with doctors. We didn't
21 mis-educate doctors.

22 We didn't mislead them. The complaint says the
23 manufacturers did. But we're being held under this plan to
24 account for the wrongs of others.

25 And there are remedies that are just so remote from any

1 conduct of Cardinal. The plan includes distributing testing
2 strips to drug addicts in homeless shelters so they can see
3 if their illegal drugs are adulterated and we're supposed to
4 pay for that.

5 And there are remedies that are related to the root
6 cause of drug abuse, such as they want mental counseling for
7 those in chronic pain because people in chronic pain are at
8 risk of developing drug addiction. Well, that may be, but
9 chronic pain has long been with us and pre-dates this
10 epidemic. It will post-date this epidemic.

11 They want us to have programs to eliminate stigma of
12 drug addiction, but stigma preceded the opioid crisis.
13 We've known about stigma since Eugene O'Neill wrote Long
14 Day's Journey into Night in 1941. So, this program is in no
15 way narrowly tailored.

16 And the rubber meets the road, Your Honor, on this very
17 last point. There is no evidence that would allow Your
18 Honor to tailor this plan when the plaintiffs haven't done
19 it themselves. There is no evidence that allows you to
20 disaggregate the components. There is no way to separate
21 out what might be narrowly tailored from what isn't at all
22 because Dr. Alexander testified he didn't do that analysis.
23 Everything is lumped in, lumped into one pot.

24 So, on behalf of Cardinal, Your Honor, I have to
25 suggest they have not proven we acted unreasonably, haven't

1 proved causation, either proximate or cause in fact. And
2 that abatement plan is entirely contrary to the power of a
3 federal court sitting in equity jurisdiction. For all of
4 these reasons, we ask the Court to grant the motion. Thank
5 you.

6 THE COURT: Let me ask you this.

7 MR. HEARD: Yes.

8 THE COURT: And, hopefully, this is not out of
9 bounds for the scope of this argument, but as you know from
10 prior arguments, Mr. Heard, I had a serious question whether
11 the law of negligence was broad enough to even cover this
12 cause of action.

13 I ruled on that issue. Didn't write an opinion about
14 it. Am I foreclosed from reconsidering that issue under the
15 law of the case doctrine as -- in the posture this case is
16 in now or is that open for me to look at again?

17 MR. HEARD: Your Honor, I think it's open for a
18 couple of reasons. One is, and as is true of any
19 evidentiary issues and other legal issues, Your Honor has
20 waited to have the full context of the evidence in order to
21 weigh some of these issues. That's one of the great virtues
22 of a bench trial, is a lot of these things don't have to be
23 decided precipitously. So, yes, I think you can re-visit
24 it.

25 And I think you will find in the brief that ABDC is

1 filing that they made a very cogent argument about why the
2 plaintiffs can't recover under a negligence standard and
3 that argument they're making meshes with the argument that
4 we're making, which is under West Virginia law the Supreme
5 Court in *Hendricks v. Stalnaker* set forth a test specific to
6 private nuisance, a three-part test for how you could prove
7 unreasonable conduct, the unreasonableness component.

8 And we believe when Your Honor re-visits negligence you
9 should also re-visit this question under *Hendricks v.*
10 *Stalnaker* of whether plaintiffs can meet that standard
11 because negligence is one of those -- one of those choices.

12 This is certainly not abnormally dangerous activity,
13 the distribution of FDA approved drugs, so that's not
14 possible.

15 The second standard is -- is negligence and ABDC's
16 brief explains why that doesn't apply because there's no
17 private cause of action to enforce the Controlled Substances
18 Act. And that leaves us with a standard that says they have
19 to prove unreasonable conduct that's also intentional with
20 knowledge that the parties knew that this was going to have
21 an impact on opioid abuse and they can't meet that.

22 So, Your Honor, I think we can -- you could re-visit
23 negligence. You could re-visit the nuisance standard, as
24 well, unreasonable interference with public right. Thank
25 you.

1 THE COURT: Thank you, Mr. Heard.

2 MR. HESTER: Your Honor, I wanted to introduce my
3 partner, Christian Pistilli. You've not met him before in
4 this courtroom during trial, but you're actually somewhat
5 familiar with his work because he's done a lot of the
6 writing for which we're most grateful on many of the briefs
7 that have been filed with the Court. So, I'm glad to be
8 able to introduce him to you today.

9 THE COURT: All right.

10 MR. PISTILLI: Good to meet you, Your Honor.

11 THE COURT: We're happy to have you, Mr. Lee
12 [sic]. You're yet another lawyer to introduce into this
13 case.

14 MR. PISTILLI: It's very good to meet you, Judge.

15 MR. HESTER: May I, Your Honor? I think I can
16 solve this.

17 THE COURT: You're Mr. Pistilli; is that right?

18 MR. PISTILLI: Yes, Your Honor.

19 THE COURT: I only called you "Mr. Lee". I only
20 got the last syllable of that.

21 MR. PISTILLI: Well, Pistilli is much harder than
22 Lee.

23 (Pause)

24 MR. PISTILLI: Good morning again, Your Honor.

25 THE COURT: Good morning.

1 MR. PISTILLI: In openings, plaintiffs' counsel
2 told the Court that it was their burden to prove actionable
3 conduct. After nearly seven weeks of testimony, it's clear
4 that plaintiffs cannot prove actionable conduct as to
5 McKesson, nor have they shown that McKesson's conduct was a
6 substantial factor in Cabell and Huntington's opioid use
7 problem. McKesson is, therefore, entitled to judgment under
8 Rule 52(c).

9 Now, plaintiffs' efforts to establish wrongful conduct
10 fall into two buckets. First, and dominantly, they point to
11 the volume of pills defendants shipped into Cabell and
12 Huntington.

13 In openings, plaintiffs referred to volume as the first
14 pillar of their case. So, I intend to start this morning
15 with a basic and undisputed proposition that the volume of
16 McKesson's shipments into Cabell and Huntington were, in
17 both relative and absolute terms, really quite small and
18 plaintiffs have absolutely no evidence tying any diversion
19 that occurred in Cabell and Huntington to the --

20 THE COURT: Well, McKesson got in trouble and paid
21 a big fine on at least one occasion, did it not?

22 MR. PISTILLI: Yes, Your Honor, and I will address
23 those settlements and the key point as to those. Well,
24 there are two key points as to those.

25 The first is that the settlements were not about Cabell

1 and Huntington and the point I was making is that they have
2 absolutely no evidence of diversion into Cabell and
3 Huntington.

4 Then the second very point I will get to is that the
5 second of those settlements was about reporting. And for
6 reasons I'll explain, the reporting issues can't -- couldn't
7 possibly have led to diversion because, at the time of those
8 reporting issues, McKesson was blocking all of the orders it
9 identified as suspicious.

10 So, you know, DEA has rules about reporting. Those
11 were addressed in the settlement. But the question here is
12 was any harm caused in Cabell and Huntington. And as we'll
13 hear plaintiffs' own experts admit, when you block an order,
14 it can't be diverted. It can't cause harm.

15 So, you know, because plaintiffs can't show that any of
16 McKesson's small volume of shipments into Cabell or
17 Huntington were diverted they couldn't possibly show that
18 McKesson was a substantial factor in Cabell Huntington's
19 harm.

20 Now, second, plaintiffs have suggested that McKesson
21 failed to design and implement an adequate system, which is
22 what I think Your Honor was getting at. But, first, we'll
23 see that McKesson's systems at all times conformed with
24 DEA's evolving guidance to the wholesale distribution
25 industry when it comes to preventing diversion and, in any

1 event, there's no evidence that those purported deficiencies
2 in the system caused any harm in Cabell and Huntington.

3 And as I just said, Your Honor, absent evidence that
4 McKesson's conduct caused diversion, caused harm in Cabell
5 and Huntington, any abstract deficiencies in McKesson's
6 programs simply are not relevant to this case.

7 Now, Your Honor has asked a couple of times today about
8 the standard, so I just want to say a few words about the
9 legal standard and we've got the next slide on that.

10 So, plaintiffs throughout this case have made various
11 claims about the standard. We've disagreed about some --
12 some of those. You know, for instance, it's common ground
13 that unreasonableness is part of the standard, but as Your
14 Honor just referenced, that's something we've briefed and we
15 do think Your Honor is free to re-visit that.

16 And in our briefs, and in ABDC's brief, as Mr. Heard
17 referenced, there's a discussion of what the applicable
18 legal standard is to establish unreasonableness, but for
19 purposes of this motion, we're just going to assume along
20 with plaintiffs that the standard is unreasonableness
21 simpliciter.

22 We actually think they have to prove more. We think
23 Your Honor can re-visit that. We think there are serious
24 questions about whether the distribution of a lawful product
25 can possibly give rise to a public nuisance claim. But at

1 least for now we're going to spot plaintiffs the standard.

2 And so, first, we're going to say that the actionable
3 conduct standard is simply reasonableness without more. And
4 then, the next thing that plaintiff has said is that they
5 have to prove, and they admit this, that each defendant's
6 conduct was a substantial factor in causing the harm.

7 And so, what I intend to show Your Honor today is that
8 plaintiffs cannot prove that any unreasonable conduct by
9 McKesson was a substantial factor in bringing about the
10 present-day opioid abuse problem in Huntington and Cabell
11 County. And so, we would respectfully submit that under any
12 standard, including the very standard that plaintiffs
13 themselves have espoused in this case, they haven't shown
14 liability on the part of McKesson.

15 Now, remember, the plaintiffs' core theory here is
16 volume, but the vast, vast majority of McKesson's shipments
17 into Cabell and Huntington were made to the federal
18 government.

19 Specifically, they were made to the Hershel "Woody"
20 Williams VA Hospital in Huntington. In his testimony, Dr.
21 McCann admitted that this facility alone accounted for over
22 76 percent of McKesson's opioid shipments and both Dr.
23 McCann and Mr. Rafalski testified that they excluded
24 McKesson's VA shipments from all of their analyses other
25 than their total volume numbers because those shipments

1 were, in Mr. Rafalski's words, not applicable to the
2 diversion topic. So, McKesson's VA shipments are not part
3 of plaintiffs' case.

4 Now, after we exclude the VA shipments, McKesson's
5 market share in Cabell and Huntington is tiny. Dr. McCann,
6 for instance, confirmed that it was less than 6 percent and
7 that five other distributors shipped a greater amount of
8 prescription opioids into Cabell and Huntington.

9 Dr. McCann also presented various charts to the Court
10 comparing defendants' shipments into Cabell and Huntington
11 with statewide and national averages and he suggested that
12 above average distributions into Cabell and Huntington were
13 somehow probative of wrongdoing.

14 But as to McKesson, Dr. McCann's own chart showed that
15 its shipments were well below average. We see it there on
16 the screen. 45 percent lower than the West Virginia
17 average. 15 percent lower than the national average.
18 That's according to Dr. McCann.

19 Now, during the course of the trial, Your Honor, the
20 Court has heard evidence about multiple different groups
21 that played a role in bringing about the opioid crisis.
22 Doctors in the medical community, opioid manufacturers,
23 state and federal regulators, people who illegally diverted
24 prescription opioids, criminal drug traffickers, drug
25 dealers and drug users.

1 Even if we accept the assumption, accept plaintiffs'
2 premise that the wholesale distribution industry as a whole
3 was also somehow a factor, given the dominant role of all
4 these other actors and given that McKesson specifically
5 accounted for only 6 percent of the total distributions into
6 Cabell and Huntington, we would submit that plaintiffs have
7 failed to prove McKesson was a substantial factor in Cabell
8 and Huntington's opioid problem.

9 But the Court doesn't need to rest on that basis alone.
10 Consistent with McKesson's very small market share, it's
11 only done business with a very few pharmacies in Cabell and
12 Huntington. Tim Ashworth, who Your Honor heard from, who
13 was McKesson's regional sales manager, he testified that at
14 any one time McKesson had only around three independent
15 pharmacy customers in Cabell and Huntington.

16 And over the course of nearly seven weeks of testimony
17 plaintiffs ever even only mentioned five McKesson customers
18 in Cabell and Huntington. As to three of those five, the
19 Fruth pharmacy, the McCloud Pharmacy and The Medicine Shoppe
20 Pharmacy, all plaintiffs did was introduce bear shipment
21 volumes and there was nothing remotely concerning about
22 these volumes.

23 For Medicine Shoppe, to take just one example, Dr.
24 McCann testified that McKesson's volume was essentially
25 zero. There was somewhat more extensive testimony about two

1 pharmacy customers, Custom Script and Rite Aid, but, again,
2 nothing remotely concerning.

3 As to Custom Script, plaintiffs focused on the fact
4 that its ordering patterns showed a relatively high ratio of
5 controlled substances, which in some cases can be a red
6 flag.

7 But Mr. Ashworth explained that there was a perfectly
8 benign explanation in the case of Custom Script. Custom
9 Script is not a typical pharmacy. It's what's known as a
10 compounding pharmacy, which means that it makes specialized
11 medicines that aren't commercially available.

12 Now, Custom Script got most of the supplies that it
13 needed for that compounding business from others. Pretty
14 much the only thing it bought from McKesson were controlled
15 substances. Thus, unsurprisingly, most of McKesson's
16 shipments to Custom Script were controlled substances, which
17 would mean the ratio is going to be quite high.

18 What's more, Custom Script was only a McKesson customer
19 from 2010-2013. Its opioid ordering went up some in 2010
20 because it took on as new client contracts with
21 Cabell-Huntington Hospital's oncology clinic and the Hospice
22 of Huntington.

23 But even then, when it took on these new contracts, it
24 dispensed less than 2,000 dosage units of hydrocodone and
25 oxycodone per month, which Dr. McCann himself testified was,

1 quote, in the bottom half of pharmacies in Cabell and
2 Huntington. So, there's no evidence of wrongdoing as to
3 Custom Script.

4 Same goes for McKesson's distributions to Rite Aids in
5 Cabell and Huntington. Mr. Rafalski suggested in conclusory
6 fashion that McKesson's Rite Aid shipments were too high,
7 but he admitted that he didn't review any concrete
8 information relating to the operation of those Rite Aid
9 stores.

10 For instance, he ignored the West Virginia Board of
11 Pharmacy Report shown on the screen there that said Rite Aid
12 was a good pharmacy for which all prescriptions appeared for
13 a legitimate medical use.

14 Notably, Dr. McCann testified that Rite Aid
15 self-distributed two-thirds of its prescription opioids and
16 McKesson distributed only the remaining one third. Mr.
17 Rafalski admitted that he could not opine as to, quote,
18 whether Rite Aid helped cause the opioid crisis in
19 Huntington and Cabell.

20 If Mr. Rafalski could not opine that Rite Aid itself
21 helped cause the opioid crisis in Huntington-Cabell, then he
22 necessarily could not opine that McKesson's minority
23 shipments to that Rite Aid helped cause the opioid crisis in
24 Huntington and Cabell.

25 So, in short, Your Honor, plaintiffs have failed to

1 prove any actionable conduct on the part of McKesson in
2 Cabell or Huntington and, for this reason alone, judgment is
3 warranted.

4 Now, Your Honor, in addition to that, plaintiffs have
5 failed to prove any actionable conduct on the part -- that
6 any actionable conduct on McKesson's part was a substantial
7 factor which plaintiffs say is part of their burden in
8 causing harm to occur in Cabell and Huntington.

9 Not a single plaintiff witness ever testified that
10 diversion was occurring at any pharmacy customer serviced by
11 McKesson in Cabell or Huntington, let alone that McKesson
12 knew or should have known about that diversion.

13 For example, as you see on the screen, Mr. Rannazzisi
14 testified that he had not reviewed any documents relating to
15 West Virginia and he could not identify any orders in
16 Huntington or Cabell that he believed should have been
17 blocked by McKesson but were not.

18 And perhaps the best illustration of this point is the
19 testimony of Mr. Rafalski. He admitted that he was, quote,
20 not offering any opinions about whether diversion occurred
21 at pharmacy level in Cabell or Huntington.

22 This concession alone is fatal to plaintiffs' case.
23 Absent concrete evidence of diversion occurring at a
24 pharmacy serviced by McKesson, plaintiffs could not possibly
25 prove that McKesson substantially contributed to the opioid

1 crisis in Cabell or Huntington. There is simply no record
2 evidence of any such diversion.

3 So, I now want to switch gears and address some of
4 plaintiffs' claims about McKesson's systems. In the
5 interest of time, I plan to focus on plaintiffs' core
6 criticisms, but I would be happy to address any questions
7 the Court has and, also, just for Your Honor's benefit, the
8 subject is addressed in a little bit more detail in the
9 brief we'll be submitting later today.

10 But, for today, I think the really critical point is
11 that the Court doesn't even need to reach the issue of the
12 advocacy of McKesson's systems. As I've already explained,
13 plaintiffs have no evidence tying McKesson's distributions
14 to any diversion in the community.

15 Absent such evidence, it doesn't matter whether
16 McKesson's systems were less than perfect as they evolved or
17 whether McKesson made problematic shipments to internet
18 pharmacies 15 years ago in Florida.

19 The question before this Court is whether actionable
20 conduct by McKesson led to diversion and then led to harm in
21 Cabell and Huntington. Because plaintiffs haven't proven
22 that, the adequacy of McKesson's systems in the abstract are
23 simply not relevant.

24 In any event, the evidence shows that McKesson's
25 systems were at all times in line with DEA's contemporaneous

1 expectations for the wholesale distribution industry.

2 Now, if we could go to the next slide, so this is a
3 typed-up version of the demonstrative that Your Honor saw in
4 connection with the testimony of McKesson's long-time
5 Director of Regulatory Affairs, Michael Oriente, and it
6 shows the evolution of McKesson's systems over time.

7 And it shows that McKesson had one system in place
8 prior to 2008. The system was replaced by the Controlled
9 Substance Monitoring Program, or CSMP in 2008. And then,
10 significant further enhancements were made in 2013 and I
11 just want to very briefly walk through each those periods.

12 Now, plaintiffs' main critique of McKesson's system
13 prior to 2008 is that it shipped the suspicious orders it
14 identified, but the undisputed record shows that DEA was
15 fully aware of and approved of that practice. It wasn't
16 until 20 -- 2007 that DEA, without making any change to its
17 regulations, informed distributors that it expected them to
18 block all orders they identified as suspicious.

19 Mr. Rafalski acknowledged this. He acknowledged that
20 there was no do not ship requirement before 2007. Indeed,
21 before 2006, Mr. Rafalski testified that he couldn't
22 identify a single distributor that blocked all orders
23 exceeding a threshold.

24 And, as for Mr. Rannazzisi, he acknowledged that the DC
25 Circuit stated in its *Masters* decision that DEA first

1 articulated, first articulated, the do not ship requirement
2 in its 2007 administrative decision in the *Southwood*
3 *Pharmaceuticals* matter.

4 Now, there's another very important point about this
5 2008 period. Before 2008, after 2008, and at every time up
6 through today, McKesson has always, always blocked orders
7 that it determined posed a risk of diversion. For example,
8 Mr. Oriente testified that there was always a manual block
9 for orders that McKesson believed likely to be diverted.

10 We'd submit, Your Honor, that especially under these
11 circumstances, plaintiffs cannot show either that McKesson's
12 pre-2008 system was unreasonable or that any alleged
13 deficiencies in that system were a substantial factor in
14 causing diversion in Cabell or Huntington.

15 Now, I next want to briefly address the 2008 settlement
16 with DEA, which is something Your Honor asked about earlier.
17 That Settlement Agreement does not reference any conduct
18 occurring in West Virginia, nor does it implicate McKesson's
19 Washington Court House Distribution Center, which the
20 testimony shows was the distribution center that served this
21 part of the State of West Virginia.

22 And what's more, that agreement stated, quote, this
23 agreement is neither an admission by McKesson of liability
24 or of any -- or of any allegations made by the DEA in the
25 orders or investigation.

1 And we would say -- we would submit, Your Honor, that
2 as a matter of blackletter law the agreement, therefore, may
3 not be used by plaintiffs to prove liability and we cite a
4 number of cases to that effect in the brief we'll be
5 submitting.

6 Notably, though, plaintiffs themselves have
7 acknowledged this point. They successfully argued to the
8 Court that settlement agreements were admissible as
9 providing, quote, notice and as evidence that, quote,
10 allegations were made, but not as evidence that the
11 allegations were true. And so, the 2008 Settlement
12 Agreement provides no factual or legal impediment to
13 granting judgment in favor of McKesson.

14 Now, I want to briefly turn to the 2008-2013 period.
15 As I mentioned a minute ago, DEA provided new sub-regulatory
16 guidance to distributors regarding their programs in 2007.
17 In response to this new guidance, in May of 2008, McKesson
18 introduced its new Controlled Substance Monitoring Program.
19 Under that program, McKesson began blocking all potentially
20 suspicious orders that it received. And that's just a
21 critical point that I want to underscore.

22 As Mr. Rafalski himself admitted, by 2008, McKesson had
23 a policy in place that involved blocking flagged orders.
24 There is zero record evidence that McKesson shipped a single
25 order it identified as suspicious since 2008.

1 There's also zero record evidence that McKesson's CSMP
2 program was designed in a deficient manner. Under that
3 program McKesson blocked all orders over a customer-specific
4 threshold that it set.

5 And this is very important. Neither Mr. Rafalski nor
6 any other witness in the course of nearly seven weeks
7 testified that McKesson set those thresholds too high or
8 inappropriately when the CSMP was put in place.

9 What we've seen is -- and Mr. Rafalski used a different
10 set of thresholds that he invented for litigation under
11 which vastly more orders, up to 90 percent would have been
12 blocked. But, as Mr. Rafalski admitted, those thresholds
13 entirely ignored the very important changes in the medical
14 community and the increase in the legitimate prescribing
15 that you heard about from Mr. Hester and Mr. Heard already.
16 So, you know, it's hard to improve on Mr. Heard's
17 explanation of the many reasons that Mr. Rafalski in his
18 flagging opinions were simply not credible.

19 So now, as we continue on in this post-2008 period, I
20 want to briefly address the second McKesson settlement. And
21 here, you know, during this post-2008 period, plaintiffs'
22 principal criticism doesn't relate to the shipping of
23 suspicious orders but, instead, it focuses on reporting.

24 And in the 2017 DEA settlement McKesson did acknowledge
25 that it did not, quote, report to DEA certain orders placed

1 by certain pharmacies which should have been detected by
2 McKesson as suspicious. But -- and this comes back to a
3 point I made at the very outset, Your Honor. As Mr.
4 Rannazzisi admitted, there's no language in there about
5 failing to block orders. And so, for two reasons, this
6 limited admission does not provide any basis for liability.

7 In the first place, there's no record evidence that any
8 of these orders were placed by McKesson's handful of tiny
9 customers in Cabell or Huntington. And, more fundamentally,
10 this time period, during this entire time period, McKesson
11 was blocking and not shipping all suspicious orders.

12 You see the quotes there on the screen. What those
13 quotes demonstrate clearly is that an order that is not
14 shipped cannot be diverted and cannot cause any harm. So,
15 since McKesson wasn't shipping these orders, it couldn't
16 have caused any harm.

17 And then, very briefly, Your Honor, and this truly will
18 be very brief, there is the post-2012 period. McKesson made
19 substantial improvements to its program in 2013. It started
20 reporting more orders. And there is a complete lack of
21 record evidence of any concrete wrongdoing on the part of
22 McKesson after 2013.

23 So, we'd submit that with no evidence in the past eight
24 years calling into question McKesson's conduct, there's no
25 proof that McKesson was a substantial factor in the present

1 day nuisance in Cabell and Huntington County [sic] and, for
2 that reason, McKesson is entitled to judgment under Rule
3 52(c).

4 THE COURT: Thank you, sir.

5 This might be an appropriate time to take another break
6 and then we'll come back.

7 (Recess taken)

8 MR. HESTER: Good morning again, Your Honor.

9 THE COURT: Good morning again, Mr. Hester.

10 MR. HESTER: I'm batting cleanup. Or I'm in the
11 fifth spot I guess, actually.

12 THE COURT: Okay.

13 MR. HESTER: But one more -- one more motion that
14 we wanted to make to the Court this morning on behalf of all
15 defendants. We move under Rule 52 for a motion for judgment
16 on partial findings based on plaintiffs' failure to prove
17 their entitlement to the abatement remedy that they're
18 seeking. And I wanted to address this in four parts because
19 I think there are really four core prongs of the plaintiffs'
20 failure to establish their entitlement to the abatement
21 relief they seek.

22 The first point I wanted to make is that the plaintiffs
23 are seeking damages and not abatement. That -- that is one
24 of the core flaws in the remedy they have presented to the
25 Court.

1 Like any tort, public nuisance, of course, involves
2 conduct. And we've included a quotation from *Kermit Lumber*
3 that has the familiar articulation that a public nuisance is
4 the doing of or failure to do something. It's a conduct
5 element.

6 And abatement does not include compensation or
7 treatment for downstream harms caused by the nuisance. And
8 that's reflected, I think, quite clearly in this quotation
9 from the West Virginia Code Section we have on the board, as
10 well, that a remedy for -- for a nuisance is limited to the
11 abatement of -- the public nuisance abatement of the
12 conduct.

13 So, compensation for downstream harms related to a
14 nuisance is damages and not abatement and I think it can be
15 illustrated quite clearly with a simple example.

16 Let's assume somebody is dumping pollutants into a
17 lake. Abatement could clearly include preventing the
18 discharge of further pollutants into the lake and it might
19 include removing the pollutants from the lake.

20 But abatement clearly would not include the
21 compensation for harms for people who drank the water from
22 the lake. Those are damages. That's not abatement.

23 And so, if you have a circumstance where somebody is
24 harmed or suffers adverse effects from the public nuisance,
25 that's a damages concept, not an abatement concept. And

1 here, the plaintiffs' remedy is overwhelmingly seeking
2 treatment for the harms of opioid use and the downstream
3 effects that follow from Opioid Use Disorder and other
4 harms.

5 HIV, endocarditis, some of the things that the Court
6 has heard a lot about in this case. NAS babies. These are
7 all people and entities, children, drug users who are harmed
8 by the drugs. These are not abatement concepts. These are
9 damages concepts.

10 THE COURT: And the damages remedy would only go
11 to the individual's harm, would it not?

12 MR. HESTER: I believe that's right, Your Honor.

13 THE COURT: I mean, look at the tobacco
14 litigation. The plaintiffs in the tobacco litigation were
15 the people who had lung cancer from smoking cigarettes.

16 MR. HESTER: That's right. And that's a -- that's
17 a fair analogy to what we have here.

18 And as the Court will recall from Dr. Alexander's
19 testimony this week, the overwhelming majority of what he is
20 contemplating in his so-called abatement remedy is treatment
21 of people who have OUD, or families adversely affected by
22 OUD, babies adversely affected by OUD, vocational training
23 for people who have OUD.

24 All of these are perfectly fine concepts. They're
25 just not abatement. They're damages, whether they're past

1 or future.

2 But that gets to the next point, which is also very
3 important here. The plaintiffs have waived all claims for
4 damages. They cannot recover them here and they've stated
5 it very clearly and very consistently in their papers in
6 this case that they've waived their claim for damages and
7 they're only seeking an abatement remedy. So, they're stuck
8 in a box. They waive damages, but now they've presented a
9 remedy to this Court that really is a damages remedy.

10 Let's go onto the next point. Aside from seeking
11 damages rather than abatement, they're also seeking recovery
12 for future addiction and future harms. And Dr. Alexander
13 acknowledged that his abatement model includes and
14 encompasses people who develop OUD for the first time after
15 2021.

16 And the Court will probably remember some of the cross
17 examination from this week where we were exploring this
18 point that Dr. Alexander, for instance, would include within
19 his abatement remedy a child who is ten years old today, who
20 has never been exposed to an opioid, who develops heroin
21 addiction in five or ten years, that becomes part of the
22 future population.

23 And, indeed, we did a little math with Dr. Alexander
24 and it was obviously not clear in his mind how you would
25 figure out how many people develop OUD in the future as

1 compared to people who have already suffered the harm, but
2 it was also quite clear that it could be a sizable
3 percentage of the -- of the entire remedial plan is
4 extending to people who are harmed in the future.

5 So, that really creates the other side of the same
6 coin, Your Honor. Either we have people who have been
7 harmed in the past who are seeking a damages remedy that the
8 plaintiffs have waived or we're looking ahead to people who
9 suffer harm in the future, but there is no proof, of course,
10 of what happens in the future on behalf of these three
11 defendants to support a future abatement remedy based on
12 future harm that -- without any evidence at all as to what
13 the defendants will be doing in the future.

14 Indeed, no evidence that the defendants will even be
15 distributing opioids in Cabell-Huntington in the future.
16 Yet, somehow, they would be on the hook for -- for a remedy
17 related to people who suffer future harm or develop
18 addiction in the future.

19 I mean, in effect, what the plaintiffs are doing here
20 is claiming a future nuisance, but the case law is quite
21 clear that if there's a claim of a future nuisance, there's
22 a heightened standard that applies to any such claim. And
23 that's the *Duff v. Morgantown Energy Associates* case out of
24 the West Virginia Supreme Court that we have here on the
25 board.

1 Plaintiffs bear a heavy burden of proving that harm is
2 reasonably certain to result from the defendants' conduct if
3 they're talking about a future nuisance. And, of course,
4 there is no evidence in this record of any future activity
5 at all. Plaintiffs made no effort to prove any future
6 conduct by the defendants and they simply have no basis to
7 seek a remedy that encompasses harm to people who have not
8 yet suffered any harm. And then, if we look backwards,
9 they've waived a damages claim for people who've already
10 suffered harm.

11 So, those are the two prongs I think are most
12 fundamental to the flaw in this abatement remedy, but there
13 are two more.

14 The next one is that the plaintiffs are seeking a
15 remedy for harms that are completely unrelated to the
16 defendants and Mr. Heard already laid out some of this, but
17 let me just highlight it quickly.

18 Dr. Alexander acknowledged that his remedial plan
19 extends to people who were never exposed to a prescription
20 opioid and he didn't know how many there are who are
21 included within his abatement model.

22 So, for instance, his abatement model would extend to
23 heroin abusers who've never been exposed to a prescription
24 opioid ever and he had no way to separate the people who
25 have been exposed to prescription opioids versus others who

1 never had any exposure to the defendants' products.

2 And it's certainly a basic principle of tort law that a
3 remedy is barred where there's no way to separate it out
4 between people who are exposed to the product that the
5 distributors distribute and people who never had any
6 exposure to it at all. And that's another core flaw in
7 their abatement remedy.

8 The last flaw that I wanted to highlight is that it
9 would lead to a windfall for the City and the County and a
10 Court sitting in equity should avoid a windfall. And that's
11 an established equitable principle. And the plaintiffs'
12 abatement plan would lead to a fundamentally unfair windfall
13 in two respects.

14 The first is that the City and the County do not pay
15 for or run the programs encompassed within this abatement
16 plan. The evidence demonstrates that the City and the
17 County do not pay for and do not run programs for treating
18 OUD and almost every other part of the programs and concepts
19 included within Dr. Alexander's remedial plan.

20 And the Court may well remember the very clear
21 testimony from Mayor Williams yesterday on this. You would
22 never expect the city government to actually start running
23 treatment programs or funding them. Yet, that is the huge
24 dollar amount that's sought, sought by this remedial plan.

25 So, we have clear evidence that the City and the County

1 don't pay for the treatment programs for which relief is
2 sought and, indeed, Medicare, Medicaid, other insurance,
3 pays for most of these OUD treatment costs.

4 Now, there have been references to collateral source
5 doctrines. That's a damages concept. The Court is sitting
6 in equity and is being asked here to engage in an equitable
7 remedy and surely it cannot be the case that the Court would
8 be blind to the fact that the City and the County are
9 seeking to recover money for programs they will never run
10 and that they have never paid for and will never pay for.
11 That's the first component of the windfall.

12 The second component of the windfall is that there was
13 no evaluation of the needs of this community. Fairly
14 shocking, we felt that Dr. Alexander did not even purport to
15 make any effort to assess the current levels of programs and
16 services provided in the community. He made no assessment
17 as to what's already being done, whether what's already
18 being done is sufficient to meet the OUD needs of this
19 community and the treatment needs of this community. He
20 made no assessment as to whether only a small amount of
21 additional spending might be needed on top of the programs
22 that are already being engaged in.

23 THE COURT: So, under your polluted lake theory,
24 if you had two factors polluting the same lake and one of
25 them was beyond the reach of the Court, the one left over

1 would have to pay the whole thing?

2 MR. HESTER: Well, I mean, that -- that would be
3 one way to think about it. But the other way to think about
4 it is if you've -- if you have a polluted lake and you've
5 taken out 98 percent of the pollution already and somebody
6 comes along, an expert comes down from Baltimore and says I
7 think it's going to cost this much to take out a hundred
8 percent of the pollution and the expert never figures out
9 that there's only two percent that needs to come out, that's
10 where you've got the problem of the windfall.

11 And that's what we have here because the evidence is
12 quite strong that there's a very powerful set of programs in
13 place in this community and there was quite a bit of
14 admirable testimony from the community leaders about how
15 much they've done.

16 Well, in fact, they may have done everything that is
17 needed and there may -- it may take time. Dr. Alexander's
18 program takes 15 years to drop the OUD level by 50 percent.
19 It may take some time, but as we heard over and over again
20 from the community leaders, they're doing a lot already.

21 Without any assessment as to whether what's being done
22 is sufficient or meets the needs of this community, how can
23 the Court sitting in equity be asked to impose an enormous
24 dollar remedy?

25 And we submit it would be an extraordinary windfall to

1 award huge dollars for programs that may be completely
2 unnecessary if, indeed, the current programs are either
3 fully sufficient, mostly sufficient, partially sufficient.

4 And Dr. Alexander didn't even purport to look at that
5 question. He just didn't look at it at all. He didn't know
6 what the current programs were or whether they were
7 sufficient.

8 And, of course, Mr. Barrett said the same thing. I
9 asked him just two days ago, you didn't look at the capacity
10 for treatment that already exists in the community? No.
11 And I'm not so sure that Dr. Alexander looked at capacity
12 either.

13 Well, that's a fairly shocking concept when the Court
14 sitting in equity is being asked to award a remedy that the
15 Court's not been provided with any information as to whether
16 the current programs and current capacity are entirely
17 sufficient or mostly sufficient.

18 So, here we are at the end of a long trial, or midway
19 through a trial, but we hope at the end, the Court is
20 somehow left to figure this all out on its own. We submit
21 the plaintiffs have failed entirely to provide the Court
22 with a sufficient basis to make a reasoned decision on the
23 appropriate remedy. They've not given the Court enough.

24 In effect, what they're doing is throwing it up to the
25 Court and saying you figure it out. And we say -- we submit

1 that's not enough, that a failure to provide a Court with
2 the tools it needs sitting in equity to order the
3 appropriate level of relief means the case should be
4 dismissed on that basis alone.

5 The case law recognizes that a claim should be
6 dismissed where the plaintiff fails to come forward with
7 sufficient evidence to support the claim for relief and we
8 submit that's what they've done. They've not given the
9 Court enough guidance to order any kind of relief along the
10 lines that they're seeking.

11 But I don't want -- in focusing on this windfall at the
12 end, Your Honor, I don't want to lose sight of first two
13 points which I really think are the most fundamental of all.
14 They're seeking a damages remedy, overwhelmingly a damages
15 remedy, for harms suffered by people exposed to opioids.
16 That was their case.

17 Their case was all about how much harm there is in the
18 community because of opioids. That's a damages concept.
19 That is not an abatement concept.

20 And then fold into that the fact that they are seeking
21 a remedy for people who suffer harm into the future. Those
22 two points really doom their abatement remedy even putting
23 aside these points about the windfall.

24 So, for this reason, Your Honor, we submit that we're
25 entitled to judgment that they have failed to establish a

1 basis for the equitable relief they seek. Of course, the
2 Court does not need to reach this if it agrees with our
3 points on proximate causation, and fault, and other issues,
4 but the remedy is another core flaw in the plaintiffs' case.

5 Thank you, Your Honor.

6 THE COURT: Thank you, Mr. Hester.

7 And the defendants have reserved some time for
8 rebuttal. Is that --

9 MR. HESTER: Your Honor, we -- yes. I mean, I
10 think we've done reasonably well, I hope, in sticking to the
11 clock.

12 THE COURT: I agree.

13 MR. HESTER: And so, we had hoped to reserve in
14 the range of 20 or 30 minutes for rebuttal.

15 THE COURT: All right. I'm going to -- it's a
16 little early, but I'm going to suggest we adjourn now and
17 come back at 1:00 rather than push the plaintiffs into their
18 argument right now.

19 MR. MAJESTRO: Your Honor --

20 THE COURT: Do you agree with that, Mr. Majestro?

21 MR. MAJESTRO: I would like to give everybody a
22 little bit longer lunch, everybody but me a little bit
23 longer lunch break. Can we come back at 2:00? And I don't
24 think we'll take the full two and a half hours.

25 THE COURT: You want to not come back until 2:00?

1 MR. MAJESTRO: Please.

2 THE COURT: Is that okay with everybody?

3 MR. HESTER: It's all right by us, Your Honor.

4 THE COURT: All right. We'll come back at 2:00.

5 And since you brought that up, I was -- at some point, I was
6 going to tell everybody this. When we -- when we come back,
7 my plan is to go back to the original schedule and go from
8 9:00 to noon and 2:00 to 5:00 except on Friday and adjourn
9 at noon on Friday. That gives me time to try to keep up
10 with some of the other things that I've got to do.

11 So, we'll come back at 2:00.

12 MR. MAJESTRO: Thank you, Your Honor.

13 (Recess taken)

14 MR. MAJESTRO: May I proceed, Your Honor?

15 THE COURT: Yes, please.

16 MR. MAJESTRO: Thank you, Your Honor. The
17 plaintiffs are proud to present this argument and the
18 summary of the case we put on over the past 30-some days of
19 trial. We believe that the Rule 52(c) motion should be
20 denied and we're going to give you some of the reasons why
21 today.

22 I'd note at the outset that today we found out that the
23 defendants are going to be filing briefs tonight. Of
24 course, we would like the opportunity to respond in writing
25 to the briefs and, you know, given the nature, we're sort of

1 at a little bit of a disadvantage because, although we had
2 -- had some indication of the general topics they were going
3 to address, the specifics were -- we saw them for the first
4 time today. So, we will get more specific citations in
5 writing for you in connection with those responses.

6 But I believe --

7 THE COURT: I want you to have an opportunity to
8 do a good job here and I don't see any reason to rush this.
9 So, do you need some time after you get their brief to
10 respond?

11 MR. MAJESTRO: Well, we'll -- with Your Honor's
12 permission, when we get those -- I understand we're getting
13 those tonight and we'll take a look at them and have a
14 proposal for you to -- talk to them and have a proposal to
15 you tomorrow morning, if that's okay.

16 THE COURT: All right.

17 MR. MAJESTRO: I'd like to start a little bit with
18 the rule here, Your Honor.

19 Gina, could you bring up Slide 1?

20 You know, I've never done a Rule 52(c) motion before,
21 so I went and looked up some of the case law and Judge
22 Chambers had a good quote on what the standard is and what
23 -- and what -- how these -- these decisions should work in
24 the context of a complicated bench trial like this.

25 And what he noted is the party opposing a Rule 52(c)

1 motion need not establish that they have met their ultimate
2 persuasive burden by --

3 THE COURT: That's similar to a Rule 50 motion in
4 a jury trial, isn't it?

5 MR. MAJESTRO: I think so. There's a -- you have
6 a little bit -- we would acknowledge you have a little bit
7 more discretion, but -- but what he said is that all that is
8 required is the character and quantity of the evidence
9 presented by plaintiffs is sufficient to defeat a motion for
10 judgment on partial findings. You don't have to establish
11 the ultimate persuasive burden.

12 Next slide, Gina.

13 Now, there's some procedural problems with -- that are
14 necessary for a Rule 52 motion that we don't think are here
15 just yet in this case. The prerequisite for a Rule 52(c)
16 motion is that a party has been fully heard on an issue
17 during a non-jury trial.

18 When the Court has not heard all the evidence, a Rule
19 52(a) motion -- that should be -- yes, a Rule 52(a) motion
20 is premature. Should be 52(c). I'm sorry. That's a typo.

21 But what the Advisory Committee noted was a judgment on
22 partial findings is made after the Court has heard all the
23 evidence bearing on a crucial issue of fact.

24 Now, my friends to my left will probably say we've been
25 heard on all of this evidence and Mr. Farrell rested today.

1 However, in front of the Court are a number of deposition
2 designations and highlighting -- there are 17 defendants'
3 witnesses that we've submitted testimony from, four from
4 ABDC, seven from Cardinal Health, six from McKesson, four
5 DEA depositions.

6 And with those depositions are included many exhibits
7 and many of those exhibits are un-objected to. So, this is
8 all evidence and I don't think I'm going too far out on a
9 limb to assume that the Court has not had a chance to review
10 all that evidence.

11 THE COURT: Well, you're absolutely right. I have
12 not gotten through all of that, by any means.

13 MR. MAJESTRO: And, fortunately, Rule 52(c)
14 provides for something like this.

15 Next slide, Gina.

16 The rule explicitly says the Court may, however,
17 decline to render any judgment until the close of the
18 evidence and in the *Sailor v. Hubbell* case the Fourth
19 Circuit noted the Court may do so, and that's decline to
20 render the judgment until the close of the evidence, even if
21 it concluded at the close of evidence that it could not give
22 a verdict in the opposing parties' favor.

23 So, this -- unlike a Rule 50 motion, this is a -- this
24 motion recognizes the flexibility of a bench trial, lets you
25 look at the whole matter in a -- in a way that we can do

1 final briefing, final proposed orders, and have -- and after
2 spending this much time in trial and more trial that, in the
3 end, you'll have a reasoned decision on a reasoned record.

4 I don't -- I mean, I've got some quotes from the --
5 from all the depositions that are in the record, but I think
6 I'll spare you that orally today and we'll put some of that
7 -- that in our briefs.

8 But -- but, in sum, we really think that this is a
9 premature motion and we ought to finish this trial, have you
10 consider this case, important case, on the entire record of
11 the entire trial.

12 So, next, I want to -- where I want to go is where we
13 started. In the very first complaint Mr. Farrell and I
14 drafted, it had -- it was a rather unique complaint, and Mr.
15 Farrell can take most of the credit for it, but it's set up
16 duty, breach, causation and damages. And that's going to be
17 the outline of my argument today.

18 And I -- I'll note for the Court, with the Court's
19 permission, in the middle of my argument there's a portion
20 of the defendants' conduct argument that Mr. Farrell wanted
21 to address and since it was his birthday, I couldn't tell
22 him no.

23 So, let's -- let's talk about duty in a nuisance case.

24 THE COURT: Let me --

25 MR. MAJESTRO: And, you know, that's -- and I am

1 happy to just answer your questions, Your Honor. I've got
2 -- I've got prepared things, but it sounds to me like you've
3 got a question and I'm happy to --

4 THE COURT: Well, it might not be fair to hit you
5 with this.

6 MR. MAJESTRO: I'll do my best.

7 THE COURT: Since you thought it was -- you
8 probably thought it was resolved. But the question I asked
9 Mr. Heard is a subject that has troubled me in this case and
10 that's whether this is really a nuisance case at all.

11 You know, and I'll give you an example of -- I don't
12 know where this is going to go. If this is a nuisance case,
13 the same theory can apply to a whole lot of situations.

14 Take Southern West Virginia has the highest level of
15 obesity in the United States with all the attendant social
16 problems that go along with that. One of the main causes of
17 that is the overconsumption of pork products, you know,
18 sausage, bacon, throw in a can of Spam once in awhile.

19 MR. MAJESTRO: I'm guilty of that.

20 THE COURT: Yeah. So am I.

21 And you could use the very same theory you're using
22 here to sue Smithfield Foods for creating that kind of a
23 nuisance, couldn't you?

24 MR. MAJESTRO: Well, I think there have been those
25 similar claims and, unlike this claim, they've been

1 rejected. And I'm going to -- that's where I want to start
2 in answer to your question.

3 This is -- where we are now, four or five years later
4 since we first started filing these cases, this is not a
5 novel cause of action. So, in denying the motion for
6 summary judgment, this Court joined every other West
7 Virginia trial and appellate judge that has ruled on the
8 existence of this opioid nuisance claim under West Virginia
9 law.

10 THE COURT: The Appellate Courts haven't ruled on
11 it, have they?

12 MR. MAJESTRO: Well, I think we have denials of
13 writs three times and that is -- and I think that there's
14 maybe one case they deny it, one time they deny. Maybe
15 that's limited.

16 Each time they do that, and this is -- these are
17 denials of whether it states a claim for nuisance. And so,
18 that -- it was the exact issue that you're concerned about.
19 That was the issue in all three of those cases, in the
20 Attorney General's case, in the case in the northern
21 panhandle, and in the case of the mass litigation panel,
22 which they followed the northern panhandle.

23 There were three writs taken up and each time the
24 Supreme Court denied it. The last two times it was
25 unanimous. But we also have three very good trial judges

1 and -- well, three courts. One of the courts is the mass
2 litigation panel that also came to that same conclusion, but
3 they aren't alone in this.

4 We filed, and I believe it's Document 1290, a survey of
5 the nuisance decision, opioid nuisance decisions. I
6 provided for Your Honor citations and copies of cases of 41
7 decisions rejecting the defendants' argument in this way.
8 Representing 20 -- 20-plus states.

9 So --

10 THE COURT: And there were at least two or three
11 that went the other way, though, right?

12 MR. MAJESTRO: I think that is correct, but I --
13 but I -- but I think I've got the numbers on my side and
14 that combined with the number -- the very West Virginia
15 specific decisions makes me feel comfortable in saying you
16 got it right when you denied the motion for summary
17 judgment.

18 THE COURT: Okay.

19 MR. MAJESTRO: I mean, it's not -- this claim is
20 not a stretch anymore. It's the substantial majority --
21 majority rule.

22 In fact, as we sit here today, my friends in New York
23 are trying a case against these same defendants and others
24 on public nuisance and my friends in California are -- and
25 Ann's partners, Ms. Kearse's partners, are trying a case

1 against the manufacturing defendants on a public nuisance
2 theory.

3 So -- so, not only are these cases proceeded past
4 motion stage, there are two other judges who have denied
5 summary judgment motions and let those cases proceed to
6 trial.

7 So, you know, on the legal claim does the opioid
8 epidemic create a factual circumstance that states a claim
9 for nuisance, common law nuisance, the vast majority of the
10 courts that have addressed that question have ruled just as
11 you did.

12 So, let's talk a little bit about the specific -- I
13 mean, and I -- if you've got any other questions on that, I
14 --

15 THE COURT: No, no. I just -- I was interested in
16 what counsel had to say about that.

17 MR. MAJESTRO: Okay. And so, you know, that --
18 that is -- and we'll address that a little -- we'll address
19 the defendants' arguments in the briefs and that -- but that
20 is -- you know, we think we are right down the middle of
21 where the rest of the country is and we think you are, too.

22 So, the nuisance standard that they're willing to
23 accept for purposes of this argument, which we think is the
24 correct standard, is that it -- the conduct just needs to be
25 unreasonable.

1 Now, in their briefing they offer three other tests
2 that are required to be -- that they allege we are required
3 to meet. We don't think we're required to meet those, but
4 we think we meet those, too, that -- that in addition to the
5 unreasonableness standard, if you define unreasonableness as
6 illegal conduct, as I'll explain, we think we have illegal
7 conduct as violations of the CSA.

8 Counsel mentioned intentional conduct, but as Your
9 Honor ruled, intentional conduct doesn't require intent to
10 cause harm. No *mens rea* is necessary, Your Honor. Your
11 Honor has already concluded that under West Virginia law.
12 Intent is the intent to act.

13 There is no suggestion on this record that defendants
14 accidentally flooded the -- flooded the market with 81
15 million pills. It was purposeful. The act of distributing
16 those pills was something that was purposeful.

17 Finally, we also have negligence and -- and a lot of
18 these arguments overlap, but if the question is what -- was
19 the defendants' conduct negligent under old standard West
20 Virginia case law, *Robertson v. LeMaster*, the touchstone of
21 duty and negligence is foreseeability.

22 And what happened in this case, we will show you, was
23 entirely foreseeable. In fact, let's start --

24 Gina, I'm going to go ahead. Go to Slide -- well, no.
25 Skip that. All right. We'll keep going.

1 So, under whatever culpability standard the defendants
2 raise or just under the more general standard of is their
3 conduct reasonable, we think we can meet all of those
4 standards.

5 And I want to -- I want to talk a little bit about the
6 CSA.

7 First of all, the United States Supreme Court's
8 decisions, I think, are very instructive. In *United States*
9 *v. Mohr* the Supreme Court held --

10 And, Gina, go ahead and bring up Slide 8.

11 Congress -- that Congress was particularly concerned
12 with the diversion of drugs from legitimate channels. It
13 was aware that registrants, who have the greatest access to
14 controlled substances and, therefore, the greatest
15 opportunity for diversion, were responsible for a large part
16 of the illegal drug traffic.

17 Back to 1943, we have Mr. Farrell's favorite case,
18 *Direct Sales*, and this is another -- another thing that
19 distinguishes your pork example from what we're talking
20 about here. The difference between sugar, cans, and other
21 articles on the one hand, and narcotic drugs on the other,
22 arises from the latter's inherent capacity for harm and from
23 the very fact that they're restricted. We're not talking
24 about everyday products that don't have an inherent capacity
25 for harm at which the exact problems that happened in this

1 case, if the rules aren't followed, were foreseeable.

2 The language in CSA hasn't changed the entire time of
3 this litigation other than a recent regulatory provision
4 that is -- that -- that is -- from its own terms confirms
5 the existing case law. The regulations haven't changed.

6 And so, what we have here is a system that was set up
7 to set up responsibilities in the so-called closed system.
8 And the reason the system is closed is for what the Court
9 said in *Direct Sales*, that -- that there is danger --
10 there's a horrible danger from these dangerous products if
11 they're not treated correctly. So, we use belt and
12 suspenders and put duties on everyone in the chain of
13 distribution.

14 Now, the defendants in this case want to blame the
15 people above them in the chain of distribution, the
16 manufacturers, and the people below them in the chain of
17 distribution, the pharmacies and the doctors, but they're --
18 they are registrants under the CSA. They make money from
19 the sale of these narcotics and, as Mr. Rannazzisi said, the
20 tradeoff is they have assumed a heightened responsibility
21 with respect to the shipments they made. It's their duty.
22 It isn't a duty that's delegable to someone else.

23 Mr. Rannazzisi confirmed that DEA relies on registrants
24 to discharge these duties appropriately because the DEA
25 cannot police the entire system itself. The question here

1 is whether the defendants discharged that duty appropriately
2 and the reason they have that duty is because they are
3 registrants.

4 Now, there are two classic decisions dealing with the
5 duties under the Controlled Substances Act and we've talked
6 a lot about them in the briefs. *Southwood Pharmaceuticals*,
7 that decision was admitted into evidence at P-23736 and
8 *Southwood* instructed distributors that if they continued to
9 ship orders without resolving suspicions they're not
10 maintaining effective controls against diversion. That's
11 Mr. Rannazzisi's testimony on -- on Page 152.

12 In short, *Southwood* confirms that distributors must
13 exercise due diligence before filling an order and the
14 *Southwood* decision found that the direct and foreseeable
15 consequence of the manner in which the respondent in that
16 case conducted its due diligence program was the likely
17 diversion of millions of doses of -- dosage units of
18 hydrocodone.

19 The second case is *Masters Pharmaceutical*, which was an
20 early birthday present for Mr. Farrell, was decided four
21 years ago yesterday. And, in this case, we brought you the
22 lead investigator from the *Masters Pharmaceutical* case, Mr.
23 Rannazzisi, and what was -- what happened in that case, the
24 ultimate holding of the DC Circuit, is -- was that it is not
25 necessary for a distributor of controlled substances to

1 investigate suspicious orders if it reports them to the DEA
2 and declines to fill them, but if the distributor chooses to
3 shoulder the burden of dispelling suspicion in the hopes of
4 shipping any it finds to be non-suspicious and the
5 distributor used something like the SOMS protocol in that
6 case to guide the efforts, then the distributor must
7 actually undertake an investigation.

8 The defendant's own witnesses acknowledged, and we'll
9 cite that testimony for you, acknowledged that -- that duty.

10 Now, we -- we've heard a lot about how the DEA -- what
11 the DEA did and what the DEA didn't do, but what the law
12 requires is independent of what a regulatory agency might
13 say or do. The defendants haven't tried to show any kind of
14 governmental estoppel. They have not tried to meet that
15 high burden. And they couldn't on the facts of this -- of
16 this case.

17 The testimony, for example, from Mr. Rannazzisi and,
18 for example, defendants' own witnesses, Mr. Mays, Mr. Mone,
19 they all testified regarding this 2005 distributor
20 initiative which the DEA met face-to-face with each of the
21 defendants and advised them of shipping to internet
22 pharmacies that should have triggered suspicions.

23 The slide decks for each of these meetings are in
24 evidence. And the slides specifically noted to the
25 defendants that the duties that the DEA was telling them

1 about to not ship suspicious orders were not limited to
2 internet pharmacies.

3 The DEA also specifically advised reporting a
4 suspicious order to the DEA does not relieve the distributor
5 of the responsibility to maintain effective controls against
6 diversion.

7 Indeed, the -- the presentations explicitly refer to
8 the *Direct Sales* case that -- that explain that you're not
9 -- about the harms of shipping these danger products.

10 Thereafter, Mr. Rannazzisi sent two letters to the
11 distributors reinforcing these obligations. They're in the
12 record.

13 And the -- and, you know, we hear a lot about, well, we
14 didn't ship any -- any drugs to any pharmacy that was not
15 registered. That doesn't relieve the defendants of the duty
16 to maintain effective controls against diversions.

17 The Rannazzisi letters confirmed a distributor may not
18 simply rely on the fact that a person placing the suspicious
19 order is a DEA registrant and turn a blind eye to the
20 suspicious circumstances.

21 So, those were in 2006 and 2007. And, I mean, I can go
22 -- go more -- more on those.

23 We have the *Masters*, the ALJ decision, and then the
24 *Masters* -- the other *Masters* -- the *Masters* DC Circuit
25 decision. And then we had the HDMA, the defendants' Trade

1 Association compliance guidelines that confirmed the
2 obligation to conduct due diligence into customers prior to
3 shipping controlled substances the obligation to monitor for
4 suspicious orders, the obligation that defendants should not
5 ship potentially suspicious orders until they have conducted
6 adequate investigation to dispel suspicions and the
7 obligation to report suspicious orders to the DEA when
8 discovered.

9 So, that's the administrative record of what the DEA
10 says. What have the courts done with those?

11 So, we have Judge Polster's opinion, which was the
12 first opioid litigation court to deal with this factual
13 situation. He upheld *Southwood* and *Masters* and adopted the
14 holdings of those cases.

15 Following that, the remand courts in the Northern
16 District of Illinois in the Chicago case, the Northern
17 District of California in the San Francisco case, and the
18 Eastern District of Oklahoma in the Cherokee case all
19 confirmed Judge Polster's rulings.

20 So, the rule is -- and according to those decisions,
21 the rule is and always has been you don't ship a suspicious
22 order without dispelling the suspicion.

23 Finally, the last sort of administrative argument I
24 want to address is the defendants briefly mentioned quotas.
25 You know, one of the depositions that we've submitted for

1 Your Honor to read is another DEA witness, Staci
2 Harper-Avilla, and she testified in her deposition that the
3 existence of those quotas that we've heard so much about did
4 not excuse the defendants from complying with their
5 obligations to identify, report and stop shipment of
6 suspicious orders. That's on Page 140 of the deposition.

7 And she also -- further testified the quota set is a
8 national quota. It is not jurisdiction specific so it
9 doesn't take into account how many pills are sold into a
10 particular jurisdiction.

11 So, we have this national quota that they split up
12 among the defendants and what the DEA is telling them is
13 that is not designed to replace the requirements that you
14 monitor for suspicious orders and not ship when you find
15 them unless you dispel -- dispel that.

16 So, at this point, I -- I want to turn the microphone
17 to my colleague, Mr. Farrell, and he's going to give you an
18 overview of the defendants' breaches of those duties in
19 Cabell County and Huntington.

20 MR. FARRELL: Thank you, Judge.

21 Without belaboring the point, I think what we've
22 attempted to do is by looking at two cases, we've attempted
23 to replicate the legal structure in *Direct Sales* from 1943
24 with *Masters Pharmaceutical* from June 30th of 2017.

25 And Mr. Majestro said that it was Mr. Rannazzisi who

1 was the lead investigator. It was actually Mr. Rafalski.
2 We brought in as an expert witness Mr. James Rafalski, who
3 was the lead investigator and built the *Masters*
4 *Pharmaceutical* case.

5 The reason these two cases are important is because
6 much of the same defenses and arguments we've heard in this
7 courtroom were raised in those two cases. In fact, in the
8 *Direct Sales* case the argument was made that the wholesaler
9 was selling to a retailer that had tax stamps from the
10 federal government and that's where their duty ended.

11 And so, when you read -- and I would ask the Court to
12 -- to read the 1943 United States Supreme Court case with
13 this evidence you've heard in mind because in there what it
14 says is that the salient facts are that *Direct Sales* sold
15 morphine sulfate to Dr. Tate in such quantities so
16 frequently and over so long a period it must have known he
17 could not dispense the amounts received in lawful practice
18 and was, therefore, distributing the drug illegally.

19 What we've attempted to demonstrate to the Court is in
20 a similar vein. We'll use AmerisourceBergen as an example.
21 We've attempted to identify the frequency, pattern and
22 volume of sales to specific pharmacies. So, as you'll
23 recall from this chart that I affectionately referred to as
24 The Matrix, the middle column is the month-by-month sales by
25 AmerisourceBergen to pharmacies in Cabell County, West

1 Virginia.

2 Then, what we've provided for the Court as a benchmark
3 for comparison purposes, a county average, a state average,
4 and a national average so that you can look at a particular
5 month and see that 40,000 dosage units of oxycodone were
6 sold in say December of 2009 and compare it to the average
7 pharmacies around the country, in the State of West
8 Virginia, and within Cabell County.

9 We also went to great lengths to establish through the
10 defendants' witnesses that their monitoring program was
11 nationwide and systemic. And what we mean by that is that
12 its successes are nationwide successes. Systemic successes.
13 But its failures are systemic failures.

14 And, as evidence of that, we've given examples in the
15 far right-hand column of other pharmacies around the state
16 that makes the argument that their systems were functioning
17 impossible.

18 We did so with reference to just oxycodone. We did so
19 with reference to hydrocodone. And we did it for each of
20 the three defendants. We went into painstaking detail to
21 show the actual transactions to actual pharmacies to
22 demonstrate that this conduct applies to Huntington-Cabell
23 County, West Virginia.

24 So, closing argument, we may spend a lot of time going
25 and comparing and giving you specific examples, but to argue

1 that we failed to identify the specific conduct to specific
2 pharmacies is not consistent with the record. What we would
3 say is the measurement of whether or not their conduct was
4 reasonable can be determined by looking at the volume of
5 pills they sold either on a local level, regional level,
6 state level, or national level.

7 Now, with regard to your comment about negligence or
8 your comment about the -- which standard we apply,
9 regardless of whatever the standard is, whether it's
10 negligence or unreasonable interference, if you're looking
11 for some baseline of what is normal, we've given it to you.
12 And to be able to look at what is abnormal, I submit, is
13 facially evident in the records that we've produced to you.

14 And, if you don't have any other questions, I'll turn
15 the floor back over to Mr. Majestro.

16 THE COURT: All right. Thank you.

17 MR. MAJESTRO: And I -- I apologize for Mr.
18 Rafalski. I get the two "R" DEA witnesses mixed up.

19 So, let's -- and let's talk a little bit about Mr.
20 Rafalski's testimony. You know, we heard a lot about --
21 from the defendants about what he didn't testify to, but
22 they didn't tell you a lot about what he did testify to, and
23 he testified that once a suspicious order is flagged it is
24 the -- it's the duty of the defendants to stop the drugs and
25 to stop the shipment of the drugs.

1 He testified about the thousands of transactions under
2 a number of different suspicious order monitoring tests that
3 one could reasonably apply that would have been flagged and
4 shipment stopped had the defendants had a -- had systems in
5 place that would do that.

6 Now, the important thing about Mr. Rafalski's testimony
7 is he went through the defendants' records and there isn't
8 evidence that -- other than this anecdotal, yeah, we were
9 doing -- we were -- we were doing due diligence, but they
10 didn't produce any evidence of that due diligence through
11 Mr. Rafalski or to anyone else.

12 And they say, well, we weren't required to keep the
13 records. But, certainly, as something as important as that,
14 if it was done, they could give us some specific examples of
15 places where due diligence was conducted and the orders were
16 stopped on a level.

17 But what we do know is that they -- for a long period
18 of time they had policies in place where they didn't stop
19 the shipments. And what we do know is, as Mr. Farrell has
20 shown you, two of these specific pharmacies, the volume that
21 went into those -- went into those pharmacies.

22 So, the combination of that evidence, we believe, is
23 sufficient for you to conclude that they were not doing
24 their job under the CSA and, as he testified, as Mr.
25 Rannazzisi testified, as a number of the defendants'

1 witnesses testified, when you don't meet the duties under
2 the CSA and orders that are shipped that are likely to be
3 diverted, you end up that diversion is likely.

4 And Mr. Rafalski testified, were orders the defendants
5 knew or should have known were suspicious likely to be
6 diverted? Yes. Does -- and he -- then that is consistent
7 testimony throughout this case.

8 THE COURT: I'm trying to remember the evidence
9 here. Once they stopped shipping orders that were
10 determined to be suspicious, were some of those ultimately
11 shipped after they looked into them?

12 MR. MAJESTRO: And I think it -- it depends on the
13 time period, but what -- what the evidence in this record
14 shows is that very little evidence of any of that due
15 diligence. And given Mr. Rafalski's testimony about the
16 potentially -- the number of potential suspicious orders --

17 And we don't just have his testimony about that. Let's
18 take, for example, what Cardinal Health -- when the --
19 during the periods of times when the defendants were just
20 massively reporting after the fact shipments of -- of orders
21 they deemed suspicious to the DEA.

22 THE COURT: But that stopped early on, didn't it?

23 MR. MAJESTRO: It wasn't -- well, it depends on
24 what you mean by early on and there's evidence in the record
25 that it continued throughout their -- their changes in

1 policies. I mean, it was really bad in the beginning and it
2 slowly -- it slowly got better, but there were still
3 problems. And what the defendants had were limits and --
4 and there's testimony about that those limits were getting
5 raised.

6 And then there's, for example, the testimony regarding
7 -- regarding some of the -- the chain pharmacies, Judge,
8 where they weren't doing -- they were letting the pharmacies
9 themselves do the suspicious order monitoring and the due
10 diligence with -- with respect to what McKesson was doing
11 with Rite Aid, for example.

12 So, there's a lot of -- there's a lot of evidence that
13 they were failing to do that. The best evidence that they
14 were failing to do that is the number of pills that were
15 being shipped.

16 And, as Mr. Farrell pointed out, the failures -- these
17 programs were all national programs. There's not any
18 testimony -- and while the DEA enforcement actions happened
19 at various places, not necessarily the distribution centers
20 that were servicing West Virginia, there's no testimony in
21 this case that the defendants' policies were any different
22 here than they were anywhere else.

23 And, finally, at one point, and when these documents
24 are in the record with respect to the defendants, they hired
25 independent consultants even to evaluate their systems who

1 found the same -- the same failures in their systems that
2 we're alleging.

3 For example, the ABDC hired FTI Consulting and did an
4 evaluation of what their -- of what their Suspicious Order
5 Monitoring System was and came up with the roles and
6 responsibilities weren't defined. They had difficulty in
7 keeping up with demands. They didn't receive adequate
8 training. They weren't sufficiently staffed. Overwhelmed
9 by the volume. Lack of direction. Limited visibility.

10 And so -- and so, it wasn't just us saying it. It's
11 not just the DEA saying it. It's the independent auditors
12 that the defendants hired to look into those systems.

13 So, you know, I think that, you know, that -- excuse
14 me. I have something stuck in my eye.

15 So, in terms of the breach, I think that we have enough
16 evidence and we'll give you more record citations to the
17 specific -- to the specific -- the specific testimony.

18 The next place I want to go to is causation. You know
19 what? I think I'm going to go to abatement first because
20 I've got them in the wrong order.

21 So, the defendants have a -- have a lot of arguments on
22 abatement and I -- and I think that the central problem with
23 the defendants' arguments is they want to treat this case as
24 an individual case brought by a private citizen on behalf of
25 an injured person and that's not what a public nuisance

1 claim is.

2 As -- as we've discussed before, a public nuisance
3 claim is brought on behalf of the public for the citizens,
4 not the individuals who are injured.

5 What the testimony in this case showed was the opioid
6 epidemic. It didn't show -- and the opioid epidemic is made
7 up of a lot of different parts, but it's one epidemic, and
8 what the abatement we are seeking to do in this case is
9 designed to do is to -- is to take care of that epidemic.

10 And there's several concepts, I think, that are
11 important that the Court understand. One is that --

12 THE COURT: Isn't there a difference between
13 stopping the epidemic, which is the nuisance, and correcting
14 all the things that have -- problems that have been created
15 because of that? Aren't we looking at really two different
16 things there?

17 MR. MAJESTRO: It's two sides of the same coin
18 because what we have -- and I will use the defendants'
19 example. Pollution, if -- if we have pollution that
20 contaminates water, contaminates land, it's not enough to
21 stop the source of the pollution. You've got to clean the
22 mess up. Otherwise, it will continue to cause harm.

23 THE COURT: You've got to clean the mess up, but
24 you don't have to pay the medical costs of everybody that
25 got sick because of the polluted water, do you?

1 MR. MAJESTRO: Well --

2 THE COURT: Is that part of the abatement or not?

3 MR. MAJESTRO: And it is. And I'll -- and let me
4 -- let me explain why. So, the medical costs -- the
5 nuisance is caused -- the consequences of the nuisance from
6 addiction are not just limited to the addicted person.
7 That's what distinguishes this case from -- from cigarettes
8 or from someone who might have gotten sick from pollution.

9 Someone who gets sick from pollution doesn't go out and
10 start a life of crime. They don't -- they don't -- we don't
11 have the societal problems with their children. We don't
12 have the problems that happened in their neighborhood. We
13 don't have them using dirty needles and catching --

14 THE COURT: You can get a communicable disease --

15 MR. MAJESTRO: Diseases, exactly.

16 THE COURT: -- from drinking dirty water and then
17 pass it out to other people, couldn't you?

18 MR. MAJESTRO: Well, and if that were the case and
19 if -- if someone created a pond that was a nuisance that
20 caused -- let's just say that COVID was spread in a pond
21 that was caused by a nuisance and you created this pool of
22 people with an infectious disease that was being spread.

23 And that's exactly what's happening in this case. You
24 heard the testimony about HIV, about hepatitis -- about
25 hepatitis. We have actual diseases that are caused by

1 people with addiction and that's the -- that's what
2 distinguishes this harm from some of those -- from some of
3 those other harms, that those --

4 THE COURT: I don't think you answered my
5 question. And maybe it was inarticulate, but what I was
6 asking is at what point is the abatement of the nuisance
7 sufficient to correct the problem and you're projecting a
8 net that's cast way beyond what I would think would be the
9 normal range of corrective action.

10 MR. MAJESTRO: Well, I think the answer would be
11 to analogize to -- and -- and pools of infectious people are
12 -- are another classic nuisance. The analogy would be to
13 stop those with the problem that are spreading the harms to
14 the public.

15 And so, in this case, Dr. Alexander presented an
16 abatement plan that had -- that -- for those 8,000 people
17 that the evidence shows have Opioid Use Disorder in Cabell
18 County. And so, he presented a plan to stop the harms that
19 are caused by that. And -- and so -- so, you -- some of
20 that is treatment for those, those people. Some of that is
21 dealing with the consequences, cleaning up the mess of the
22 consequences, that the people addicted to opioids have
23 caused to the community, the harm that they've had to the
24 public, and -- and we believe that those are reasonably
25 within the realm of what it would take to abate -- abate the

1 problem.

2 So, in terms of the -- and then, Mr. Hester also had
3 some other arguments that I want to -- I want to address at
4 this -- at this point.

5 We hear a lot about -- from the defendants about, well,
6 the 15-year-old who isn't addicted yet, or the person who
7 went straight to -- to heroin never -- never had
8 prescription drugs. And I -- I think that's a
9 misrepresentation of the abatement plan and what we're
10 proposing.

11 Dr. Alexander testified about what the infrastructure
12 was that's necessary to solve -- to solve this problem.
13 That some other people might be beneficiaries of that we
14 don't think makes it improper to have that program. And,
15 you know, what -- what -- especially when we're talking
16 about an epidemic that is one -- that is one epidemic.

17 What -- What Dr. Alexander said is this is what's
18 necessary. And we're not even spending the money to solve
19 the program to a hundred percent. He's saying this is
20 reasonable -- it's a lot of money. It's a reasonable
21 program, but you only get to 50 percent.

22 So, the fact that maybe some -- some people who got
23 caught -- were part of -- in the epidemic not as a result of
24 -- maybe not as a result of the defendants' actions
25 shouldn't discount the abatement plan, which the testimony

1 is, is necessary to deal with the 8,000 or so people who are
2 in that -- in that group.

3 The next point I want to make about that is --

4 THE COURT: But somebody who -- who -- suppose
5 that program were put in place. If somebody goes out and
6 gets hooked on Mexican heroin, they're in the group that the
7 abatement plan affects and that's way beyond the -- the
8 initial problem, isn't it?

9 MR. MAJESTRO: Well, I -- I have two responses to
10 that, Your Honor.

11 First of all, we set up that program because that's
12 what's necessary to deal with the epidemic that we have that
13 the defendants are a proximate cause of. That's -- that's
14 -- that's my first response.

15 My second response is that, as Dr. Alexander testified,
16 some of these people -- the reason we have heroin in Cabell
17 and Huntington is not because the heroin dealers thought it
18 was a great idea to come to Cabell and Huntington. The
19 testimony -- we believe the testimony shows that -- that
20 those kinds of illegal drugs that Mr. Zerkle testified to
21 and that some of the other witnesses testified were rare in
22 Cabell County.

23 So, now we have a heroin -- an opioid epidemic where
24 the existence of these illegal drugs is in part due to the
25 problems caused by the defendants. So I don't think you can

1 completely divorce the situation from -- from their conduct
2 because it's the single opioid epidemic that they are a
3 cause of.

4 And I think I want to back up and talk a little bit
5 about West Virginia --

6 THE COURT: Your evidence on the gateway theory
7 was kind of thin, wasn't it, Mr. Majestro?

8 MR. MAJESTRO: I think it's anything other than
9 that and I'll tell you --

10 THE COURT: Well, tell me what it was and maybe I
11 --

12 MR. MAJESTRO: And the first -- the first thing
13 I'll say, Your Honor, is that that's the one argument the
14 defendants didn't make today. They -- their argument is
15 they're not responsible for it. It's -- it's a proximate
16 cause legal argument.

17 They didn't argue that heroin -- heroin doesn't cause
18 -- or that heroin isn't caused by virtue of the exposure to
19 these prescription opioids. And when I get to -- and I'll
20 address that more when I get to the causation argument, but
21 I want to finish -- with Your Honor's permission, I want to
22 finish the important thing -- things I want to deal with in
23 terms of splitting out the abatement program.

24 First of all, I think it's clear that on this record at
25 this point that we have a situation where we have joint and

1 several liability. Your Honor struck the notices of
2 non-party fault consistent with what the mass litigation
3 panel did.

4 And -- and I -- I won't spend a lot of time on this
5 oral presentation explaining the four opinions of the
6 Supreme Court, but in the end, the Supreme Court didn't
7 overturn the mass litigation panel's ruling which was
8 identical to Your Honor. We believe that that ruling is
9 consistent with West Virginia law and consistent with the
10 general West Virginia law that -- common law that joint and
11 several liability is the rule.

12 Old cases, for example, *Mackeigan v Hickman* in 1921
13 noted that a more liberal standard applies to joint and
14 several liability in equity. The number of cases at -- have
15 held that the kind of claim that we are -- that we are
16 seeking is a proper remedy, remedy in equity.

17 And, you know, one of the -- the argument on
18 apportionment, the problem with the defendants' argument on
19 -- we can't tell how much of it goes to -- how much of it
20 comes from the doctors, or illegal, or other -- other
21 causes. The problem with that argument is that's not our
22 burden. That's theirs.

23 So, under West Virginia law, the burden is on the
24 defendants to make the allocation when there is -- when
25 there is an indivisible loss like here. So, there's no

1 suggestion that we can split up the -- this opioid epidemic
2 into divisible parts and, even if there was, it's their
3 burden to do that under West Virginia law and, when we brief
4 it, I'll cite the cases for you.

5 Once we make a prima fascia showing the defendants can
6 only limit liability if they can show that injuries are
7 capable of apportionment and it's their burden to do that
8 apportionment. That's *Blankenship v. General Motors*,
9 *Johnson* -- by *Johnson v. General Motors*.

10 In fact, this Court in *Grant Thornton v. FDIC* said
11 unless sufficient evidence permits the fact-finder to
12 determine that damages are divisible, they are indivisible.
13 This Court recognized that, quoting Restatement Third of
14 Torts Section 26.

15 So, we're -- as here, you have concurrent negligence
16 and the defendants must prove that the damage caused by each
17 is clearly separable permitting the distinct assignment of
18 responsibility to each.

19 Now, in the context of public nuisance the Supreme
20 Court of Appeals has recognized that there -- that a
21 nuisance is a condition that by its nature is likely to be
22 indivisible. In *McMicken* (phonetic), the Court said
23 although brought into existence or maintained by the
24 separate acts of a number of persons, a nuisance considered
25 in all of its aspects and elements may be an entire thing.

1 And that's exactly the situation here with respect to --

2 THE COURT: Is there any difference between *Grant*
3 *Thornton* when you had defendants operating within a narrow
4 sphere in one specific situation leading to a bank failure?

5 MR. MAJESTRO: Right.

6 THE COURT: Accountants, lawyers, bank -- banking
7 experts. Here, the misconduct is like beads on a chain. It
8 happens over here and one -- with the manufacturers. It
9 happens down here with the prescribing doctors. And isn't
10 that -- it seems to me -- I'm struggling with this concept,
11 but it seems to me that that is a significantly different
12 situation.

13 MR. MAJESTRO: It's a different situation, but the
14 rule is still the same. Once you get past the causation
15 burden that the defendant is a substantial factor in causing
16 the indivisible loss, then the burden shifts to the
17 defendants to divide and that's what -- that's what the law
18 says.

19 So, if it's -- and the burden shifts --

20 THE COURT: Does it matter how remote one mis --
21 act of misconduct is from another one that produces the
22 ultimate result?

23 MR. MAJESTRO: I'm sorry. I missed the beginning
24 of what you just said.

25 THE COURT: No matter how remote one act of

1 misconduct is from the ultimate act that results in the
2 loss?

3 MR. MAJESTRO: And I -- so, I think the answer to
4 that is we still have to meet the test for remoteness and
5 the -- we have to get past the causation burden.

6 And Your Honor has denied the summary judgment motions
7 with respect to causation and our burden in showing
8 causation and I'll just -- let's go to causation now.

9 Pull up Slide 4, Gina.

10 *Wehner v. Weinstein*, a classic West Virginia case.
11 When multiple wrongdoers each contribute to a combined harm,
12 all that is required to show proximate cause is that the
13 actions of a tort feisor contributes in any degree to the
14 injury.

15 Go to the next, the next slide, Slide 5.

16 And let's talk about *Wehner*. *Wehner* was a case where
17 you had a bunch of defendants that ultimately -- it was a
18 fraternity up in Morgantown where a pizza delivery truck
19 parked. They parked and blocked a driveway. And the -- and
20 some members of the fraternity wanted to move their car,
21 wanted to get out their car and were being blocked, so they
22 took the brake off the car, let it roll down High Street,
23 and killed two girls.

24 So, you had fairly disparate acts. You had somebody
25 blocking a parking lot and then somebody -- somebody taking

1 the action of running the car downhill. In that case, the
2 Supreme Court affirmed the finding of causation.

3 In *Everly v. Columbia Gas* the Court held a plaintiff is
4 not required to show defendants actions' were the sole
5 proximate cause, only that they were a proximate cause.

6 THE COURT: Those are negligence cases, weren't
7 they? Isn't there a difference between --

8 MR. MAJESTRO: Well, if there --

9 THE COURT: -- this case and a negligence case?

10 MR. MAJESTRO: There is and that -- and what the
11 case law shows is that in a nuisance case a causation burden
12 is lighter, not heavier.

13 THE COURT: Okay.

14 MR. MAJESTRO: And I'm glad you reminded me of
15 that, Your Honor.

16 So, the -- then we get to the issue of intervening
17 cause and remoteness. And, you know, I think what we --
18 where we look to that is that -- that what the case law says
19 on those concepts is that the touchstone is foreseeability.

20 And so, we go back to *Direct Sales*. We go back to all
21 of the testimony that says when you distribute opioids in a
22 manner that they're likely to be -- that they're likely to
23 be diverted, the result of that is exactly what we have
24 here. You get addiction. You get transition to heroin.

25 You know, I think we had -- the pills to heroin

1 evidence we think is pretty strong and the evidence from Dr.
2 Keyes and the other -- and the other experts on the studies
3 about how much more likely it is to -- that users of heroin
4 started on pills. So, we have all of that causation
5 evidence.

6 And, again, as to what I -- as to what I noted before,
7 it's strong enough that I don't think the defendants believe
8 that we haven't proven that case because that's not an
9 argument -- an argument they made here today. Their
10 argument is not that we haven't proven it. Their argument
11 is that it's too remote.

12 And I think the answer to that is back to the elements
13 of what we're talking about, back to *Direct Sales*, back to
14 the other Supreme Court cases, back to the statutory
15 findings of why the Controlled Substances Act was created,
16 and back to the testimony of all of the experts and all of
17 the defendants, many of the defendants that recognize that
18 when you put this dangerous product into the system that's
19 outside the closed system, what you have is the foreseeable
20 consequences of addiction that leads to these other
21 problems, these other problems.

22 And if you look at what the evidence shows, that the
23 transition from pills to heroin, that the -- it was -- the
24 reason it's so stark is that when the pills started shutting
25 down, that's when the heroin became evident. The lay

1 witnesses even figured that out. The experts gave you the
2 scientific studies that proved that that was the case. And
3 the testimony of numerous witnesses in this case are clear
4 to establish that that was something that was foreseeable.

5 The DEA witnesses testified to that. The defendants'
6 witnesses testified to that. The -- Dr. Keyes and the other
7 -- Dr. Waller all the other experts had testified to that.

8 Our very first witness in the case, Dr. Waller,
9 explained how the molecule, the heroin molecule and the
10 opioid molecule is the same, that the effect on the brain
11 and the body and that -- that once you take that away, the
12 opioid high, the opioid addiction away, the poor person who
13 is stuck with that addiction looks for a substitute and the
14 illegal drug dealers were more than happy to provide that.

15 That is not some farfetched theory. That's science
16 that we believe we established. And it's not something that
17 surprised anybody. That is consistent with what all of the
18 medicine is. It's consistent with the reason we have --
19 have these statutes, these statutes in place.

20 Last thing I want to talk about on causation is this
21 whole thing with the doctors.

22 First point I would make is that -- and pharmacies
23 because we have some bad pharmacies in this case -- is that
24 joint and several liability, apportionment, all of those
25 causation theories apply to that, apply to that argument.

1 We are not arguing the defendants are the only ones
2 responsible. We are arguing that they are -- that we have
3 produced enough evidence that you can conclude that they're
4 a substantial factor in this indivisible opioid epidemic.
5 So, it doesn't matter that these other parties contributed
6 to it, also. They are still joint and severally responsible
7 and -- in this indivisible problem.

8 The second point I would make is that we produced
9 testimony that they are not totally divorced from the
10 marketing of these drugs. We had Dr. Mohr testify about the
11 defendant's participation in the marketing. So, we believe
12 there's sufficient evidence for Your Honor to conclude that
13 the -- that they are somewhat responsible at least for the
14 marketing itself.

15 The last point, I think, is the most important and that
16 is when you look at the volume we're talking about, 81
17 million -- if I've got -- if my memory is correct, 81
18 million pills, we're talking about different counts, but the
19 volume is very high.

20 And what they tell you is most of the doctors are good.
21 Most of the pharmacies didn't cause these problems. But if
22 you remember the testimony of Lacey Keller, the bad
23 pharmacies and the bad doctors, even if we're only talking
24 about 1 percent, 1 percent of 81 million pills is 800,000
25 pills.

1 And, as the evidence in this case from the DEA
2 witnesses testified, if you have rogue doctors and rogue
3 pharmacies that we presented evidence of some of those
4 happening in Cabell County, they can do a lot of damage.
5 So, even when you don't have -- have high percentages of bad
6 conduct, low percentages of bad conduct creating addiction
7 in a population with the numbers at the level we are at is
8 sufficient to also be a cause of this epidemic.

9 So, they can't run away from the doctors, the bad
10 doctors and the bad pharmacies. As a participant in this
11 closed system they had a duty under the Controlled
12 Substances Act to monitor and do their part to prevent
13 diversion. We've presented a lot of evidence of that
14 failure. That failure is a cause of the single epidemic in
15 Cabell County and we presented a plan to -- to abate that,
16 abate that problem.

17 And, you know, the last -- last point I want to make
18 is, and this one is -- and I know I said last a couple of
19 times, but I had forgotten about this one when I was talking
20 about abatement and that is let's talk about what this --
21 the City and County are doing.

22 So, they have the advantage of being sued by somebody
23 who actually did their best to solve this problem. Now, the
24 deaths, the current situation, it's clear from the evidence
25 that was presented, there's still an opioid epidemic in

1 Cabell County. So, whatever they're doing is not enough.

2 The numbers -- and, you know, we had Mr. Barrett's math
3 notwithstanding the amount of money that's being spent
4 currently is a drop in the bucket of what it's going to take
5 to eradicate just 50 percent of the opioid epidemic.

6 So, it's not necessary -- and it's not necessary for
7 Dr. Alexander to look at what they're doing because what
8 they're doing now is not enough and, most importantly,
9 what's being done now is not being done by the defendants
10 and that's the point of the collateral source rule.

11 And so, what they want you to do is they want you to
12 say, well, because the federal government has taken care of
13 this problem, because the state government has taken care of
14 this problem, it's not these -- the City's and County's
15 responsibility to take care of the problem. That's contrary
16 to the statutes which give them the authority to abate this
17 nuisance that's not being abated.

18 And those other monies and the grants and other
19 good-meaning private people, all of which the evidence shows
20 is insufficient to solve the problem now, there is no -- Dr.
21 Alexander's testimony was that this is what's -- this
22 program is what's necessary to stop the epidemic. There's
23 no testimony that what is going on now is necessary and
24 sufficient to solve the epidemic. And so, even if you look
25 at what's there, we still -- there still needs to be much

1 more.

2 And, finally, the fact that other people are paying for
3 it and not the people who caused the problem should be what
4 concerns us all. The defendants want to say, well, the
5 State's paying for it.

6 And the reason we have the collateral source rule --
7 and they say, well, the collateral source rule applies only
8 to damages. The reason we have the collateral source rule
9 is it is a doctrine founded in equity. It is not a legal
10 doctrine. It's an equitable doctrine. It is an equitable
11 doctrine that deals with how to allocate a windfall.

12 So, defendants are at fault.

13 THE COURT: Is the argument that it's a legal
14 doctrine because it goes to damages?

15 MR. MAJESTRO: No. It's an equitable -- if you
16 look at the case law, Your Honor, it's an equitable doctrine
17 to say we have a windfall. Who should bear the -- who
18 should bear the -- who should bear the burden of the
19 windfall? Who should bear the benefit?

20 And what the doctrine says is that it is the -- that
21 the benefit of that goes to the party that's not at fault.
22 The defendants should not be able to claim, well, all of
23 these other people are solving this problem so we don't have
24 to. And especially in a situation here where -- where
25 there's no showing that it's sufficient.

1 And I think if -- and, you know, in your opinion you
2 cited Judge Polster's decision in the Northern District of
3 Ohio case and I -- and I think the reason I would
4 distinguish that case is *Kenney v. Liston* is not the low and
5 high. The *Bates* case in Ohio is directly contrary to the
6 direct holding in *Kenney v. Liston*. The West Virginia
7 Supreme Court rejected that theory and found -- and we're
8 not talking about even a payment to someone else.

9 The facts of *Kenney v. Liston*, what they said, that the
10 discount that your insurance company negotiated with a
11 provider is a collateral source. It didn't even require a
12 payment. And they listed every possible collateral source
13 in the rule and said this is a non-exhaustive list.

14 So, when you start with a doctrine founded in equity
15 and a decision as broad as *Kenney v. Liston*, I believe that
16 on these facts the Supreme Court would apply to an abatement
17 action brought by -- brought by cities and counties.

18 So, I think I hit the highlights of the defendants'
19 arguments. Let me --

20 (Pause)

21 MR. MAJESTRO: Mr. Farrell wants to conclude.

22 I just want to say that we will look carefully at the
23 defendants' briefs and respond point-by-point with evidence
24 and law to deal with those.

25 THE COURT: All right.

1 Mr. Farrell?

2 MR. FARRELL: Thank you for your patience, Judge.

3 You asked some tough and challenging questions that are
4 very important to a resolution of this case and, at the risk
5 of making it more confusing, I'm going to use your analogy.

6 THE COURT: Okay.

7 MR. FARRELL: If you'll recall Dreamland,
8 Dreamland is a pool in Portsmouth, Ohio.

9 THE COURT: I've read Dreamland twice, Mr.
10 Farrell, and I'm old enough to remember when it was going
11 strong, believe it or not.

12 MR. FARRELL: Yes, sir.

13 THE COURT: And that was a long time ago.

14 MR. FARRELL: The author of the book, Sam
15 Quinones, he used Dreamland, the Dreamland pool, as a
16 metaphor for what was happening in the community.

17 So, let's see if we can use the same metaphor to
18 understand with the factory polluting into the pond. What
19 we are -- are trying to communicate is that a public
20 nuisance is an act or a condition. So, while the act of
21 polluting a pipe into the pond dumping pollutants, yes, you
22 can stop the dumping of chemicals into our water.
23 In West Virginia, the Kanawha River, we've experienced that.

24 The condition that is left behind are those individuals
25 that are in that pond. And I understand your question that

1 plaintiffs perhaps are putting too many people in that pond,
2 that if there is a person who has never taken a prescription
3 pill, or is not born yet and, at 12 years old gets addicted
4 to black tar heroin, you're saying, Mr. Farrell, how do you
5 put that person in the pond?

6 Well, that might be fair. We'll take that for a
7 second.

8 One could argue that just like in the book Dreamland,
9 that we didn't have a whole bunch of Mexican black tar drug
10 dealers in Huntington, West Virginia in the 1990s, but that
11 because of the same storyboard in Dreamland, they ended up
12 here.

13 But I'm not even going to go there because what I'm
14 attempting to do is I'm attempting to identify that if you
15 take a *reducio ad absurdum* and take the most far-reaching
16 example to use that to judge our abatement plan, you'll
17 always be able to find fault with it.

18 Using the factory dumping into the pond, what we're
19 trying to do is we're trying to clean the water. So, if we
20 build a treatment plant to treat the water and it happens to
21 screen out not only the chemicals dumped by the defendants,
22 but also other contaminants, well, God bless us, but that
23 doesn't negate the fact that the treatment facility is
24 necessary to begin with to address this condition.

25 So, we acknowledge that there are some logical

1 extremes, but what we firmly believe is that we can define
2 those human souls that are in that pond.

3 And the evidence on the gateway effect is this: Four
4 out of five heroin users began with prescription opioids.
5 Heroin use has tripled, quadrupled and quintupled in our
6 hometowns.

7 THE COURT: Is that in the record, the four out of
8 five figure?

9 MR. FARRELL: Yes, Your Honor.

10 THE COURT: It is?

11 MR. FARRELL: And I believe it will be relatively
12 undisputed and that you'll hear from some of the learned
13 experts on the other side, as well. The medical literature
14 is as strong as it has ever been and, in fact, since the
15 expert witness depositions, there's even more medical
16 literature on it that I know you'll hear about in the coming
17 weeks.

18 But four out of five current heroin users started on
19 prescription opioids. The reason for that, we explain with
20 Dr. Corey Waller when we drew the molecule on the board,
21 it's the same molecule.

22 What the drug dealers figured out is they could mass
23 produce the same molecule, bring it here, and sell it
24 cheaper. That's what they figured out. That's Dreamland.

25 So, the epidemiologists testified from the -- from

1 their studies. The scientists have given us the basis. The
2 gateway effect is not a myth. It's not a myth. It's not a
3 theory. We're not calling it the gateway theory. It is the
4 gateway effect.

5 Now, on top of all of that, what we're trying to do is
6 we're trying to establish that there is a solution. And if
7 you just take a step back and you ask the common sense
8 question to a hundred Americans, what do you think is going
9 to be the foreseeable result if you deliver 81 million pills
10 of pharmaceutical grade opium into a community of less than
11 a hundred thousand people, what are the common sense
12 sequelae you think are going to happen?

13 The first thing that people are probably going to say
14 is addiction. The second thing they'll probably say is
15 they're probably going to say overdoses. The third thing
16 they're probably going to say is wait for the heroin drug
17 dealers.

18 So, all in all, we have to kind of get our minds around
19 what the proper analogy is. We all learn by experience and
20 analogy. And so, we are, too, struggling with figuring out
21 the analogy of what to do with this.

22 But what we believe by taking the opposite, I'll take
23 the *reducio ad absurdum* to Kermit, West Virginia. How can
24 you take tens of millions of pills into a community of 400
25 people and not expect there to be problems? So, however we

1 define it, we're going to put our arms around this epidemic
2 and we're looking for a solution.

3 The hard part for this Court, I think, is when we get
4 to the end and we have to make some important -- not we, you
5 have to make some important decisions on whether this is one
6 indivisible injury, or whether it is divisible, on whether
7 or not you're going to allocate for it because I think at
8 the end when we give closing arguments and we draw the
9 timeline of events, I think we're going to agree on what
10 happened. I don't think the defendants are going to dispute
11 the number of pills they sold.

12 They're going to say these were lawful transactions.
13 We're going to say it was unreasonable.

14 I don't think there's going to be any dispute that
15 there are pharmacies that were not doing their job selling
16 those pills and that there were doctors that were not doing
17 their jobs writing the prescriptions. I think we're all
18 going to agree that drug dealers were providing licit and
19 illicit prescriptions to everybody in the community. And I
20 think we're all going to agree that there is a bad opioid
21 epidemic and that something needs to be done about it.

22 The real question is whether or not we've proved under
23 the burden of law that the conduct by the defendants was
24 unreasonable and was it a substantial factor in this public
25 nuisance.

1 If those two factual issues are yes, then the rest of
2 this case has a lot of legal hurdles, a lot of legal
3 decisions you must make. And we think we're pretty squarely
4 -- squarely within the law. We think public -- this is the
5 right way to do it. Rather than bringing 8,000 personal
6 injury cases, we think that we have standing for -- to abate
7 the public health crisis.

8 If this were COVID, ask ourselves -- and I don't -- I
9 don't want to make light of it because it's not -- it's not
10 something to make light of, but if the defendants were
11 directly involved with selling a product that causes COVID,
12 then we start drawing better analogies.

13 THE COURT: How is this different from tobacco and
14 asbestos litigation where you could arguably apply your
15 nuisance theory to that situation, but those cases were all,
16 like you say, 8,000 personal injury cases, maybe probably
17 more than 8,000 in the asbestos situation. How is this case
18 different from that?

19 MR. FARRELL: This case is different because we've
20 taken a different approach for a solution. If you think
21 about the tobacco cases, there were a whole bunch of
22 individual cases that went to trial and most of them lost,
23 quite frankly.

24 And then the Attorney Generals came around and they
25 actually filed a subrogation claim for the expense they were

1 writing. They didn't bring a public nuisance case. The
2 genius of the tobacco litigation was somebody figured out,
3 and it was the AG from Mississippi, that the standing of a
4 state to bring a subrogation case was viable, right? So,
5 that's kind of like in a different pod.

6 If you look at the asbestos --

7 THE COURT: But the subrogation argument puts that
8 case closer to this, this one, right?

9 MR. FARRELL: Well -- well, for purposes of
10 standing, the attorney generals were seeking restitution for
11 their own personal out-of-pocket expenses. So, if you could
12 board -- this would be no different than if Cabell County
13 could board that we spent X dollars on treatment of opioids,
14 we should be reimbursed. That's a damage claim, right?

15 Now, on the asbestos side of things what you have is
16 you have individual claims and then the TPPs, the
17 third-party payers, filed cases, the unions, the -- all --
18 they came in and that was millions and millions of
19 individual damage cases.

20 The real kind of crux of this is -- and I don't want to
21 bore you with the background, but it's really lead paint and
22 handguns. So, the lead paint cases were brought on public
23 nuisance. It wasn't brought by kids or the parents of kids
24 who ate the lead paint and got lead poisoning. It was
25 brought out in California by, I think, Los Angeles and said,

1 look, we've got lead paint all over the place and they filed
2 a public nuisance case.

3 Now, across America, the public nuisance cases for the
4 most part did not succeed and that's because a lot of the
5 states argued that at the time the lead paint was being
6 sold, those were -- it was not foreseeable that it was going
7 to cause lead poisoning.

8 The difference here in this case, the reason we filed
9 this suit, is because *Direct Sales*, selling narcotics, has a
10 different foreseeability element. That's the first hurdle I
11 got over when I started looking at it.

12 The second thing I looked at was the handgun cases.
13 Now, for the most part, the handgun cases struggle, as well,
14 because the transaction between the wholesaler and the
15 retailer, there was no duty. There was no unlawful act or
16 wrongful act that people could find. So, those handgun
17 cases failed.

18 So, when I started reading the law and I came across
19 the *Cardinal Health v. Holder* case, I thought, well, there
20 you have unlawful wrongful conduct. So, the two paradigms
21 here of lead -- lead paint failed for one reason and the
22 handgun cases failed on the other on the most part.

23 We solved both of those here. We have foreseeability
24 back to the 1970 Controlled Substances Act. We have -- and
25 even if you don't take the congressional record, we have

1 foreseeability from the DEA and from Congress with the 2001
2 hearing, the Rannazzisi letters. We have built
3 foreseeability up beyond which can be disputed.

4 What it really comes down to is what standard you're
5 going to require us to meet to show actionable conduct.

6 You'll recall in opening statement I kind of put a
7 circle around that box and punted on it because it's a legal
8 debate.

9 But if you decide what hurdle we have to overcome and
10 we overcome it, I think you are well within the bounds of
11 law to order abatement of the condition and we have
12 attempted to bring in the leading experts in the country on
13 that very thing.

14 We've brought in guys from Johns Hopkins, from Harvard.
15 We brought in Columbia. We brought in the Head of the DEA.
16 We brought in the guy who did the *Masters* case.

17 We've tried to replicate those administrative actions
18 for you not on a national level. Not someplace else. We've
19 tried to replicate what happened here. And I hope we've
20 done a pretty darn good job of trying to link together these
21 disparate pieces to make it a cogent argument.

22 Thank you.

23 THE COURT: Thank you, Mr. Farrell. Thank you.

24 Mr. Hester, you may rebut.

25 MR. HESTER: Thank you, Your Honor.

1 THE COURT: Just a minute. We probably need a
2 break here.

3 MR. HESTER: That's fine, Your Honor.

4 (Recess taken)

5 (Proceedings resumed at 3:33 p.m. as follows:)

6 MR. HESTER: Thank you, Your Honor.

7 THE COURT: You may proceed, Mr. Hester.

8 MR. HESTER: So I'm going to make a few points and
9 observations and then my colleagues as well will have some
10 points they want to make.

11 THE COURT: All right.

12 MR. HESTER: Very quickly, on Mr. Majestro's first
13 point about prematurity, the rule contemplates that if a
14 party has been fully heard on an issue that the Court can
15 enter judgment on partial findings.

16 And on the two key issues we raised, causation and the
17 flaws of their abatement model, they have been fully heard.
18 The deposition designations they're talking about do not go
19 to either of those issues. And the Court did not hear any
20 reference to any evidence presented at the trial that
21 contradicts our points that prescribing behavior is what
22 drove the volume and that, that defeats their proximate
23 causation obligation.

24 And, in particular, it's notable that they failed to
25 make any reference to *Employer Teamsters* or *City of*

1 *Charleston*, the two cases out of this district that have
2 specifically found that proximate causation is defeated
3 where there's intervening medical judgments that give rise
4 to the alleged harm.

5 And there's no question here that the alleged harm is
6 the effect from the downstream prescribing of opioids and
7 what happens once they're out in the community.

8 And as to that issue, the plaintiffs have offered no
9 answer to the Court. That defeats proximate causation under
10 the standard of *City of Charleston* and *Employer Teamsters*.

11 It's also important to note -- Mr. Majestro asserted
12 that we had not challenged the gateway theory. We have. We
13 made -- I made the argument this morning that the gateway
14 theory is defeated because it depends on a premise that
15 there was an excessive volume of prescription opioid pills
16 and that led to later use of illegal drugs.

17 And we made the point as a matter of law that that is
18 unduly remote. And it begins with the prescribing decisions
19 of doctors. And then it involves illegal conduct of various
20 criminal actors.

21 Of course we didn't dispute factual points. That's not
22 the way that we would anticipate the Court to resolve a Rule
23 52 issue. But we did make the point that proximate
24 causation cannot be established as to illegal drugs because
25 it depends on the premise that there was an excessive

1 volume, the excessive volume occurred because of doctor
2 prescribing behavior. Then the second point is that there
3 was subsequent illegal activity that led to the use of the
4 illegal drugs. That defeats proximate causation.

5 I also wanted to go back to the Court's questions about
6 the nature of the abatement remedy the plaintiffs are
7 seeking here.

8 They are clearly seeking to deal with the downstream
9 harms caused by the use of opioids, opioid use disorder,
10 subsequent effects in the community that come from that.

11 And I think you heard in Mr. Majestro's own language as
12 I was writing it down consequences of the epidemic stopped
13 the harms caused by the epidemic. Those are damages
14 concepts.

15 Another point the plaintiffs never responded to is that
16 they have waived their damages claim. That's a fundamental
17 point here that makes this different from a public nuisance
18 case that often has a damages component as well as a future
19 request for injunctive relief.

20 Here the plaintiffs are only seeking an abatement
21 remedy. Yet, the remedy they've presented to the Court is
22 clearly based on harms to the people who were exposed to the
23 opioids and who were exposed to the adverse effects flowing
24 out of it.

25 They are not seeking to address the defendants'

1 conduct, and that's quite clear. There was nothing said in
2 the, in the plaintiffs' argument that was responsive to one
3 of the core points we made that they are not dealing with
4 the defendants' conduct. They are dealing with the harms
5 allegedly caused by the fact that doctors prescribed a high
6 volume of opioids.

7 So, again, in terms of the remedy the plaintiffs seek,
8 the, the fact that they are only seeking 98 percent of the
9 remedy is focused around treatment and is focused around
10 downstream effects flowing out of opioids. That is the core
11 flaw in their abatement remedy.

12 But it's also quite important to go back -- and I do
13 want to highlight that they have failed to respond to our
14 argument on proximate causation.

15 Foreseeability is not the sole test for proximate
16 causation under West Virginia law. There is clearly an
17 element of remoteness embedded in West Virginia law on
18 proximate causation.

19 We cited the cases to the Court this morning under West
20 Virginia law, but the *Employer Teamsters* case and the *City*
21 *of Charleston* case both make the point that remoteness is an
22 element of West Virginia proximate causation law.

23 And I found it quite notable that there was no response
24 to the point that the harms alleged are remote when we take
25 account of the independent decisions of doctors and the

1 failure to answer those two cases out of this district we
2 submit reflects the weakness of the plaintiffs' position on
3 proximate causation.

4 I would also add, Your Honor, that this is not a case
5 where there is one injury. It's not a simple case like
6 *Grant Thornton*, for instance. And I know that was a complex
7 case that this Court worked on.

8 But this is a, this is a complex multi-faceted
9 proposition. It's a social problem of enormous dimension.
10 There is independent activity of each of these defendants.
11 It's not a simple case.

12 It's quite different from the *Weiner vs. Weinstein* case
13 that the plaintiffs cited which was a single injury flowing
14 out of a sequence of events and it was a concurrent
15 negligence case. That's different from what we have here.

16 Here we have a very complex set of factors and
17 independent activity of separate defendants and not a single
18 injury. It's a very different kind of case.

19 So I think a number of the arguments that the
20 plaintiffs made fall apart at the threshold because of that
21 point.

22 I did want to highlight again that, that Mr. Farrell's
23 remarks and holding up of the charts only highlights that
24 their case turns on volume. And if the case turns on
25 volume, it falls apart on volume as well.

1 And the reason it falls apart on volume is because the
2 evidence is uncontroverted, undisputed, and quite extensive.
3 The volume is driven by doctor decision-making. And the
4 plaintiffs did not dispute that today.

5 And *Employer Teamsters* and the *City of Charleston* tell
6 us that if the theory of the case is that the independent
7 decision-making of doctors led, led to the subsequent harm,
8 that case is too remote under West Virginia law.

9 I would also close up here by talking about the
10 references to the collateral source rule.

11 There is no case, first of all, that says the
12 collateral source rule applies to an equitable abatement.
13 And the Court made that point I think in denying previously
14 the plaintiffs' motion on collateral source.

15 But perhaps even more importantly, it's important to
16 distinguish this case from the paradigm of a collateral
17 source. Collateral source might apply, for instance, if
18 somebody's hit by a car and then gets insurance and they've
19 suffered an injury.

20 Here there's no showing that the city and the county
21 have suffered the injury. It's, it's third parties who are
22 engaged in the activity and it's third parties that are
23 receiving -- that are making the payments. It's very
24 different from a conventional collateral source case.

25 And, so, we don't think that the collateral source rule

1 at all answers the problem that's presented here, which is
2 really that there would be a fundamental windfall to the
3 city and the county if the Court were to engage in the, in
4 the kind of abatement relief that the plaintiffs have sought
5 here.

6 Your Honor, I, I'm sure we will have more to say on
7 this once we see the plaintiffs' brief. But unless the
8 Court has questions, I can turn it over to my colleagues.

9 THE COURT: All right. Thank you, Mr. Hester.

10 MR. HEARD: Your Honor, I'd like to address just
11 three subjects. But I'd like to begin with the question you
12 asked me at the end of the argument, which was about
13 revisiting the nuisance claim. And I'd like to address what
14 Mr. Majestro said about that.

15 First of all, it's quite clear that Your Honor can
16 revisit your ruling. I had an experience two years ago that
17 I was reminded of during the break in which Judge William
18 Smith in the District of Rhode Island granted summary
19 judgment against me without opinion, and then six months
20 later reversed himself and denied the motion for summary
21 judgment.

22 You can certainly revisit the question. And if you'd
23 like, we could also, as a matter of formality, refile it.

24 But Your Honor is in a unique position because you are
25 now the only Federal Judge in this opioid litigation who has

1 heard evidence in one of these cases. Only one State Court
2 has done that, the Oklahoma court. So you are really in a
3 unique position now to evaluate the legal arguments in light
4 of having heard the evidence.

5 And if you do that, then I would remind you that what
6 the plaintiffs are asking you to do is something that no
7 West Virginia Court has done or, rather, the West Virginia
8 Supreme Court has never endorsed.

9 There is no West Virginia Court, Supreme Court decision
10 in which the Court has recognized a nuisance claim in a
11 products case, a case arising from the misuse or abuse of
12 products. That would be a new development entirely in West
13 Virginia law.

14 And that no reported case, West Virginia case, has the
15 Court awarded as a remedy for a nuisance claim remedies for
16 downstream harms to individuals, something like the
17 abatement plan involving addiction and other medical
18 treatment for individuals. That's never been awarded as
19 relief in a nuisance case in West Virginia. And, indeed,
20 it's never been awarded as relief in any federal case.

21 The lead paint cases involved cleaning up the lead
22 paint in the houses. They quite clearly did not involve any
23 relief for the children who had eaten the lead paint chips.
24 So they're asking you to do something unprecedented and
25 that's worth revisiting.

1 The direct answer to Your Honor's question about the
2 asbestos case or the lead paint cases or a case involving
3 obesity is what's said in the Restatement (Third) of torts
4 in Section 8. The commentary to that section says there
5 have been cases which have tried to apply nuisance law to
6 products cases like lead paint and asbestos and tobacco and
7 we, the commentators, say that's a misapplication of
8 nuisance law. That's better addressed under products
9 liability law.

10 And for certain in the several writs that have gone to
11 the West Virginia Supreme Court during this litigation, the
12 Supreme Court has never addressed the merits of nuisance
13 claim, nor indeed have most of the decisions in this
14 litigation provided a thoughtful appraisal that we asked
15 Your Honor to make where the fundamental distinction has to
16 be made.

17 We talked about a public nuisance, and there has to be
18 an interference with a public right. As you and I discussed
19 at the summary judgment argument, you've got to distinguish
20 between what's an interference with a public right and
21 what's an interference with a private right.

22 And the plaintiffs so broadly define what is an
23 interference with a public right that they leave that
24 private right element entirely out of the Restatement
25 definition. And if you leave it out, then you can be sure

1 that there will be a flood of cases involving obesity or
2 anything else or it's Katie bar the door.

3 Now, I'd like to say this on the question of whether
4 Cardinal -- and it applies I think to McKesson and ABDC as
5 well -- acted reasonably, whether there's proof that they
6 acted unreasonably. And I'll just try to paraphrase. I
7 think it's pretty close to a quote of what Mr. Farrell said.

8 The measure of whether the conduct is reasonable is the
9 volume sold. The measure of whether the conduct is
10 reasonable or not is the volume sold. And that just can't
11 be, Your Honor. That is a fundamental divide between us.

12 They need to prove that we acted unreasonably. And to
13 prove that we acted unreasonably, they have to consider the
14 historical context. And they have to understand if the
15 standard of care changed, and that there wasn't anything
16 suspicious about filling pharmacy orders for doctors who
17 were prescribing in good faith pursuant to the prevailing
18 standard of care who were prescribing pursuant to what was
19 essentially the bible for prescribers, the book that was
20 given to every West Virginia doctor by the West Virginia
21 Board of Medicine, not given to them by some, even some
22 professional society, not given to them by Purdue Pharma,
23 given to them by the West Virginia Board of Medicine and
24 said, "Follow this."

25 And plaintiffs simply can't show that we're acting

1 unreasonably when we fill the orders necessary for
2 pharmacies to dispense to patients who come in with a
3 prescription because their doctor in good faith has said,
4 "You need this for the treatment of your pain."

5 What we needed in this case and we didn't get was
6 evidence -- in Cardinal's case -- where the plaintiffs name
7 a single Cardinal customer, one of those 37 pharmacy
8 customers, and provide evidence showing this is what you did
9 wrong vis-à-vis this pharmacy. You set the thresholds
10 wrong. You didn't go out and investigate. If you'd looked
11 and investigated, you would have seen this pharmacy was
12 associated with a pill mill.

13 We know from the example of A-Plus Pharmacy it's
14 possible to come forward with that kind of evidence. A-Plus
15 Pharmacy, the owner, the pharmacists, they went to jail.
16 They were working hand-in-glove with a pill mill. But they
17 were supplied by Miami-Luken, not by McKesson, not by ABDC,
18 not by Cardinal Health.

19 Where is that kind of evidence? Where is that example
20 as to any of the defendants in this case?

21 We didn't surprise them with that argument today. But
22 they can't come back and give you an example as to any of
23 our customers.

24 The evidence for Cardinal is that we modified our
25 system in 2007-08 after the DEA changed the rules and gave

1 us an example to follow which was ABDC -- the example of
2 ABDC. We followed it.

3 We set thresholds which weren't criticized by Mr.
4 Rafalski. We flagged every order Mr. Mone said in excess of
5 the threshold. We blocked the orders that were flagged. We
6 evaluated every one of those blocked orders.

7 And there's no criticism of that except to say, well,
8 the volume still continues to be big. That just doesn't
9 suffice as evidence that we acted unreasonably.

10 And there's certainly no systemic failure here. If
11 there was some systemic failure with our systems, then they
12 would be able to give you one example of a pharmacy in West
13 Virginia that was like A-Plus Pharmacy.

14 THE COURT: Blocked orders were sometimes shipped
15 after they were evaluated; is that right?

16 MR. HEARD: That's correct. So we set the
17 threshold, no criticism of that. If it's in excess of the
18 threshold, we block it, evaluate it, and then ship it.

19 THE COURT: I can't remember the evidence, but the
20 quality of the evaluation would be pretty key there,
21 wouldn't it?

22 MR. HEARD: That's key. And, of course, the
23 burden of proof is on the plaintiffs to show that that, that
24 due diligence wasn't done.

25 And as I tried to explain this morning, what we have is

1 Mr. Rafalski on direct examination making a very broad claim
2 that he had reviewed all of the due diligence files and he
3 found nothing to dispel his suspicion.

4 The problem is it doesn't square with what he admitted
5 on cross-examination which is he only looked at some of the
6 due diligence files. And he didn't even look at the due
7 diligence files for the initial flagged orders, and he
8 doesn't know of any example of a pharmacy getting diverted.
9 And he didn't look at any of the orders to see if there was
10 something like A-Plus Pharmacy where the doctors were
11 clearly violating contrary to any standards of care
12 whatsoever.

13 I mean, that's the problem, Your Honor. You didn't
14 hear a single answer to the argument. I said that they
15 don't prove cause in fact. If we had done more due
16 diligence, what would we have found? Would we have found
17 bad doctors prescribing contrary to the standards of care
18 who were -- who are sending prescriptions to their patients
19 to our pharmacy customers? That's what they need to prove.
20 No witness even addressed the question.

21 They need to show that if we blocked more orders, it
22 would have affected the volume coming into
23 Cabell/Huntington. There are 30 other distributors who have
24 stepped in to fulfill the orders for any blocked, any
25 blocked pharmacy. They don't have any witness to even

1 address the question.

2 They fault us for not reporting more suspicious orders,
3 but there's no witness who even addressed the question
4 whether the DEA would have done more. And we know the DEA
5 would not have done more because the DEA had all the volume
6 data. It had it on a monthly basis. And it did nothing and
7 that's not to blame them. That's, that's to go back to the
8 question of historical context.

9 The DEA didn't do anything when they saw this volume
10 because they believed and recognized at the time that
11 99.5 percent of doctors were prescribing appropriately. And
12 the appropriate response to these greater number of
13 prescriptions was for them to raise the annual quota
14 nationwide because everybody believed, it was the
15 conventional wisdom, that it was okay to prescribe opioids
16 for the long-term treatment of chronic pain.

17 I submit, Your Honor, there's complete failure to prove
18 that we acted unreasonably. And it was interesting to note,
19 and confirming what I said this morning, there's not even a
20 claim that Cardinal Health acted unreasonably after 2012,
21 which means for the last nine years distributors, even under
22 their evidence, their view of the evidence have been acting
23 reasonably.

24 So the last thing I would like to just touch on is
25 abatement.

1 I thought it was a -- I think it's a fact, but
2 certainly it's a challenge to the plaintiffs. I said they
3 have not been able in four years of this litigation to point
4 to a single case in which any Federal Court in the history
5 of the republic has ever done what they want Your Honor to
6 do by way of a remedy.

7 Pointing that out is no surprise. We've been waiting
8 for four years to see such case. And they can't cite you to
9 such case because they're asking the Court to grant an
10 equitable remedy where there is an adequate remedy of law.

11 They're asking you to award \$2.6 billion that's not
12 adjunct to any injunctive relief or any claim for
13 restitution or any claim for disgorgement. No Federal Court
14 has ever done that.

15 This stuff about joint and several liability,
16 apportionment, has nothing to do with the abatement remedy.
17 We're not arguing here between the three defendants about
18 joint and several liability. We're not fighting about
19 liability apportioned between the three of us.

20 We're pointing out that a Federal Court in equity has
21 to tailor the equitable remedy to the wrong. And they
22 haven't tailored it to the wrong when it's to solve the
23 whole opioid crisis regardless of our wrongful conduct and
24 what we did and when we did it.

25 It's not because they don't believe there are a lot of

1 people at fault. You'll remember Mr. Rannazzisi's
2 testimony. Mr. Schmidt, "Do you believe X is at fault and Y
3 is at fault and Z is at fault?" And he said, "Yes, yes,
4 yes." Of course, Mr. Rannazzisi didn't accept any fault at
5 all.

6 But the remedy has to be tailored to the wrong of these
7 three defendants. They haven't done that.

8 And, so, I will say at the end, Your Honor, they're
9 asking you to do what no Federal Court has done. And
10 they're just asking you to ignore common sense when they say
11 we acted unreasonably.

12 If 99 percent of doctors were prescribing the drugs
13 appropriately, there's no way that 90 percent of the
14 pharmacy orders were suspicious. That just defies common
15 sense.

16 And if the State of West Virginia sued these three
17 defendants for damages and collected \$75 million in *parens*
18 *patriae* capacity on behalf of every resident of the state,
19 it makes no sense for Cabell/Huntington to be claiming that
20 \$2.6 billion is a reasonable abatement remedy. Everything
21 they're saying defies common sense and we think it's
22 appropriate to grant the motion.

23 Thank you.

24 THE COURT: Thank you, Mr. Heard.

25 Mr. Nicholas.

1 MR. NICHOLAS: Thank you, Your Honor.

2 I hope to be even briefer than my two colleagues, but I
3 will at the end ask if I can, incredibly enough, introduce a
4 new partner of, partner of mine to speak to you about one
5 tiny point who you have not met before I don't think and
6 it's Ms. Watterson.

7 THE COURT: I have met Ms. Watterson.

8 MR. NICHOLAS: Good, excellent. I'll be really,
9 really short.

10 It was striking I thought today how little of an effort
11 the plaintiffs were able to muster to present any evidence
12 at all to address the question of conduct on the one hand
13 or, or proximate cause, causation on the other.

14 I heard Your Honor's question about the quality of --
15 how the quality of the evaluation and the programs is key,
16 the question you asked just now.

17 There was nothing that the plaintiffs have suggested in
18 this case, no evidence that they pointed to today in
19 argument to suggest anything negative in that regard.

20 But I would remind the Court with regard to
21 AmerisourceBergen, for example, that you heard four of our
22 witnesses testify at length about our program and about the
23 work we've done and the results we've achieved.

24 And, frankly, you know, yes, it's a bench trial and not
25 a jury trial. But the evaluation of, of witnesses, the

1 quality of the testimony, the credibility of the witnesses
2 is just as much, you know, your province as it is to a jury.

3 And I, I would strongly urge us all to try to think all
4 the way back to those four witnesses, those four
5 AmerisourceBergen witnesses, Mr. Zimmerman, Mr. May, Mr.
6 Mays, and Mr. Perry because they were subjected to a lot of
7 cross-examination and, you know, the evidence came through
8 with flying colors is really -- I mean, just, just to go out
9 and say it.

10 And one last thing on this point and then I am going to
11 turn this over to Ms. Watterson.

12 The other thing is, you know, the issue of
13 reasonableness of conduct of our behavior, what did the DEA
14 think? Where was the DEA?

15 The DEA has never fined AmerisourceBergen. We made
16 presentations of our program with Ameri- -- I'm sorry --
17 with the DEA. We trained DEA personnel.

18 The program that we created in 2007 became a model for
19 the industry that the DEA basically recommended that the
20 other distributors follow. And they did, as Mr. Heard has
21 just pointed out.

22 What are we supposed -- in terms of our reasonableness,
23 when our regulator has been telling -- has basically been
24 working with us for years, essentially endorsing our program
25 for years, not, not having -- it has taken no action against

1 us since 2007 whatsoever of, on the record, on this record
2 and, for that matter, didn't do anything prior to it except
3 for the one instance in, the one shutdown in Orlando,
4 Florida, in 2007, that has something -- that is worth
5 looking at when one considers reasonableness here. There is
6 simply no evidence of any unreasonable conduct on the part
7 of my client, none.

8 So that's kind of what I wanted to say and I will
9 introduce you to your old friend Ms. Watterson now because
10 there is a point that we want -- last point we want to make.

11 Thank you, Your Honor.

12 THE COURT: She was on closed-circuit TV when I
13 met her.

14 MS. WATTERSON: I was, Your Honor. Nice to see
15 you in person.

16 What I'm going to talk to you about now, Your Honor, is
17 what the West Virginia Supreme Court did recently. And I
18 didn't think I would be here talking to you about it today
19 in connection with the directed verdict motions which go to
20 whether plaintiffs have met their burden of proof because
21 what was going on in an issue in the writ in front of the
22 West Virginia Supreme Court had to do with the question of
23 non-party fault, apportionment, the 2015 act, which really
24 only comes into play if plaintiff meets their burden on the
25 elements of a public nuisance claim and, most importantly,

1 to prove proximate cause.

2 But as Mr. Heard mentioned when he was talking, during
3 plaintiffs' response to the proximate cause argument, they
4 raised issues about the 2015 act and joint and several
5 liability.

6 So let me just say this. I talked about them mixing --
7 I used the word mixing apples and oranges. Mr. Heard
8 pointed out that it really didn't have anything to do with
9 the central question before the Court today.

10 I don't want to mix apples and oranges, but I can't
11 leave the room without saying the following.

12 On at least two different occasions, plaintiffs have
13 suggested that the West Virginia Supreme Court's recent
14 decision on the writ challenging the MLP's ruling striking
15 the non-party fault motions, or notices -- and, by the way,
16 I know Your Honor also granted their motion to strike
17 non-party fault and I'm going to talk to you about this at
18 the end of the case.

19 But let me say this. There is absolutely nothing in
20 the West Virginia Supreme Court's three opinions that
21 foreclose this Court from, at the right time, determining
22 that apportionment of fault to non-parties, again assuming
23 plaintiffs get past their burden and meet their burden,
24 there's nothing in those opinions that foreclose this Court
25 from reconsidering its ruling saying that it wasn't going to

1 look at non-party fault in this case and it wasn't going to
2 apply the 2015 act because, in short, Mr. Majestro said he
3 wasn't going to go through the opinions. I'm going to go
4 through it in three sentences.

5 The majority opinion, the three Justices, Walker,
6 Hutchison, and Wooton, denied the writ only because they
7 concluded that it was too early in the MLP case to figure
8 out what it is the plaintiffs were actually requesting by
9 way of their remedy, whether it was money or equitable
10 relief.

11 They said nothing at all that suggested that just
12 because it was a public nuisance claim, just because someone
13 labeled their requested relief abatement that it never could
14 be the type of request for relief -- I call it cash money --
15 where the non-party fault statute would apply, the 2015 act
16 would apply.

17 Two of the Justices went so far as to say, given what
18 they understood that the MLP plaintiffs wanted -- and that
19 was Justice Armstead joined by Chief Justice Jenkins --
20 said, you know what, we think on this record that's before
21 us, we think that what plaintiffs want, no matter that they
22 call it abatement, is money. They want a sizeable transfer
23 of cash from the defendants to the plaintiffs. And we would
24 include on this record, without awaiting anything, that the
25 2015 act applies.

1 So, Your Honor, when we get there in the case, I want
2 to say that there is nothing in the Supreme Court's opinion
3 that forecloses this Court from concluding that it can
4 consider, assuming again plaintiff met their burden of
5 demonstrating liability on the part of defendants, and as
6 we've argued today, we don't believe that they have or that
7 they can, that non-party fault will come into play.

8 And again, Your Honor, it's not -- it doesn't have
9 anything to do with proximate cause. But on several
10 occasions, plaintiffs have said something about the Supreme
11 Court opinion and I thought it was important to point this
12 out now.

13 I also want to point out that -- you know, Mr. Hester
14 has argued and I don't want to be in tension with the
15 arguments that he's made on behalf of all of us, that what
16 plaintiffs are seeking by way of abatement are categories of
17 damages that are not recoverable under an abatement theory.

18 And I would say plaintiffs can't have it both ways.
19 They can't be seeking such sizeable amounts of money -- Mr.
20 Barrett called it, what he was doing was doing his reduction
21 to present value so as to arrive at a lump sum. Lump sum is
22 cash. Cash is, is money.

23 And when money is involved, as it is here in
24 plaintiffs' request, then the 2015 act applies. And that's
25 what the legislature intended.

1 But maybe I will talk to you about that more later.
2 But I just wanted to point out that the Supreme Court's
3 recent decision doesn't foreclose you from revisiting your
4 ruling on non-party fault.

5 And, as a matter of fact, Your Honor, I would say it
6 compels the reversal or the reconsideration of your decision
7 because unlike the MLP, we know what plaintiffs want here.
8 They've already put that evidence in front of you, and the
9 act would apply.

10 So thank you for bearing with me at the end of a long
11 day.

12 THE COURT: Thank you, Ms. Watterson.

13 Yes, sir.

14 MR. PISTILLI: Just one point related to McKesson
15 and blocking, one legal point, Your Honor. I promise to be
16 the fastest of the day.

17 You had asked Mr. Heard about the defendants' systems.
18 And I just wanted to make clear that when McKesson's new
19 system was put in place in 2008, we didn't have a pend and
20 ship system. If an order was blocked, it stayed blocked.

21 And then very quickly, just a related legal point on
22 blocking.

23 You heard about *Direct Sales*. And I would suggest that
24 plaintiffs are conflating two things.

25 At most, the Supreme Court's *Direct Sales* case stands

1 for the proposition that if a party like a distributor knows
2 or has reason to believe it's extremely likely that a
3 narcotic they ship out is going to be diverted, is going to
4 be used improperly, maybe there's a liability if they
5 nevertheless make that shipment.

6 That's something very different, and that's something
7 that McKesson, I believe -- and there was testimony from Mr.
8 Oriente on this that I showed you this morning and I believe
9 the other defendants as well.

10 At all times, McKesson has been blocking orders that it
11 believed were likely to be diverted. That's separate from
12 the DEA change in policy that came about in 2007-2008.

13 That involves blocking of a much larger number of
14 orders, the orders that meet the broad regulatory definition
15 of suspicious.

16 Now, if you go and look at those regulations, Your
17 Honor, they don't say anything about blocking. It's just
18 not in there.

19 And it was clear from the testimony of the DEA
20 officials, including Mr. Rannazzisi and Mr. Rafalski, that
21 this was a new policy announced in 2007 that registrants
22 should block all of those orders.

23 And as you've heard today, we all began doing that in
24 2008. So I just wanted to make that clear for the record on
25 blocking, Your Honor. And with that, I'll rest.

1 THE COURT: Thank you, sir.

2 I look forward to reading the briefs on this.

3 We'll take your witness tomorrow, Mr. Hester.

4 MR. HESTER: Yes. That would be Dr. Gilligan,
5 Your Honor.

6 THE COURT: All right. We'll take Dr. Gilligan as
7 an accommodation of the defendants. And then we'll come
8 back on Wednesday at 9:00 a.m. and start the defendants'
9 case.

10 And for the time being, at least, I'm going to take
11 advantage of the provision of Rule 52(c) that says the Court
12 may decline to consider any judgment until the close of the
13 evidence. I'm not sure I'm going to do that, but I want to
14 read the briefs first.

15 MR. HESTER: Your Honor, we do have copies of the
16 briefs that we'll hand up to the Court and to the parties.

17 THE COURT: Thank you very much. All right.

18 When can I expect to hear from the -- see the
19 defendants' [sic] paper?

20 Mr. Majestro?

21 MR. MAJESTRO: Our response, Your Honor. I'd like
22 to see it first. Can we have -- can we give you an answer
23 to that question tomorrow morning?

24 THE COURT: Yes.

25 MR. MAJESTRO: I'll consult with my colleagues.

1 THE COURT: I'd rather give you time to do your
2 usual workmanlike product rather than force you to dash it
3 off in a hurry, particularly in view of everything that's
4 come up today.

5 MR. MAJESTRO: Appreciate it, Your Honor. And my
6 colleagues who are going to assist me will appreciate it
7 too.

8 THE COURT: All right. If there's nothing further
9 to take up, I'll see everybody tomorrow.

10 (Trial recessed at 4:11 p.m.)

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1 CERTIFICATION:

2 I, Ayme A. Cochran, Official Court
3 Reporter, and I, Lisa A. Cook, Official Court Reporter,
4 certify that the foregoing is a correct transcript from
5 the record of proceedings in the matter of The City of
6 Huntington, et al., Plaintiffs vs. AmerisourceBergen
7 Drug Corporation, et al., Defendants, Civil Action No.
8 3:17-cv-01362 and Civil Action No. 3:17-cv-01665, as
9 reported on July 1, 2021.

10
11 S\Ayme A. Cochran

12 Reporter

13 s\Lisa A. Cook

14 Reporter

15 —

16 July 1, 202117 Date
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Ayme A. Cochran, RMR, CRR (304) 347-3128

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